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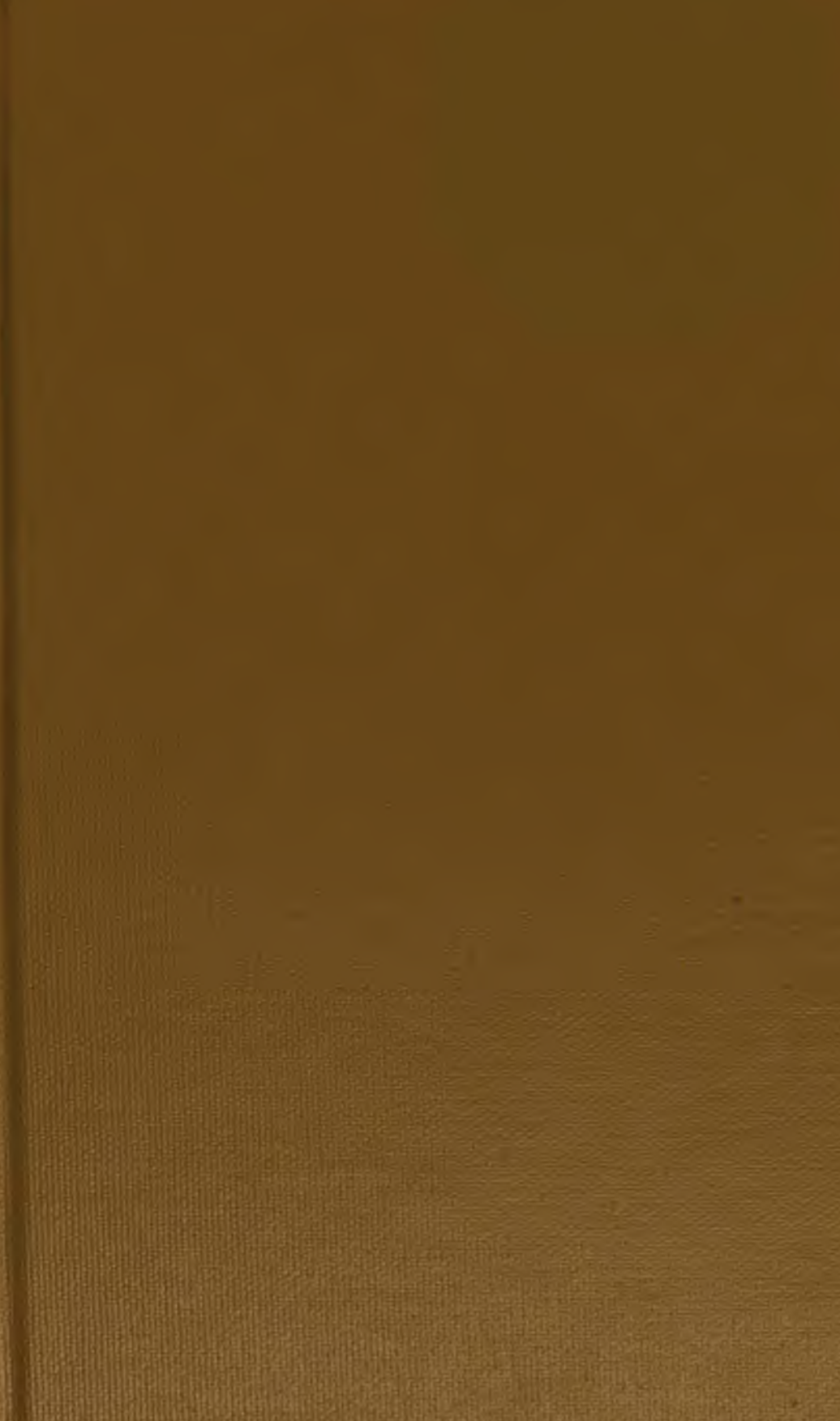
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A TREATISE
ON THE
LAW OF THE STATUTE OF FRAUDS,
AND
OF OTHER LIKE ENACTMENTS IN FORCE
IN THE
UNITED STATES OF AMERICA,
AND IN THE
BRITISH EMPIRE.

BY
HENRY REED,
OF THE PHILADELPHIA BAR.

IN THREE VOLUMES.

VOLUME II.

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P R E F A C E .

IN fulfillment of what was suggested in the preface to the first volume of this book, the special work of the gentlemen who have assisted the author can here be best pointed out. It has been contributed by them as follows: In chapter XXXIII., on the subject of Land, Mr. Ellis Ames Ballard; in chapters XXXIV. and XXXV., on Surrender and on Leases, Mr. John Marshall Gest; and in chapters XXXVI.-XLIV., on Trusts, Mortgages, Partition, and Deeds, Mr. William Wilkins Carr; in chapter XLV., on the Statute of Limitations, Mr. Richard Stockton Hunter; and in chapter XLVI., on certain miscellaneous statutes, Mr. Ballard.



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CHAPTER XX.

SUBSEQUENT ORAL ALTERATION OF A WRITTEN CONTRACT.

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§ 440. THERE are few subjects of general interest as to which the law is more uncertain, than as to how far a written contract may at a later date be orally changed. It may be said as a general rule in cases not affected by the Statute of Frauds, that such a subsequent oral modification or discharge of a written contract is valid.^(a)

Subsequent alteration of written contract generally valid.

(a) See as to this rule, and upon the general subject, the following cases: *ler v. Baker*, 22 Vin. Abr. 529; *Inge v. Lippingwell*, 2 Dick. 469, citing *Pitcairn v. Hopgood*; *Edwards v. Weeks*, *Langden v. Stokes*, Cro. Car. 383; *But-*

The statement of the rule, as made in *Goss v. Nugent*,^(b) is the one most frequently cited, viz., that it is competent for the parties, after the agreement is reduced to writing, at any time before a breach of it, by a new contract not in writing, unless the agreement is one required by law to be authenticated by writing, either to waive the same altogether, or dissolve or annul it, or in any manner to add to, subtract from, or vary, or qualify the terms of the instrument, and thus to make a new contract, which, in a proper case, may be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it by the new stipulations.^(c) A provision of a written contract, it has been said, being for the mutual benefit of both parties, may be waived by them.^(d)

2 Mod. 259; Lord Ilchester (*Ex p.*), 7 Ves. 377; *Giraud v. Richmond*, 2 M. G. & S. 835; *Stowell v. Robinson*, 3 Bing. N. R. 928; 5 Scott, 196; *Lanyon v. Toogood*, 13 M. & W. 27; *Jervis v. Berdridge*, 42 L. J. Ch. 518; *Robinson v. Page*, 3 Russ. 114; *Nunn v. Nunn*, 43 L. J. C. P. 243; *Sanderson v. Graves*, L. R. 10 Exch. 236; 44 L. J. Exch. 210. See *Rob. & Jos. U. C. Dig.* 730, etc., 735, etc.; *Raymond v. Smith*, 5 Conn. 557; *Dickinson v. Dickinson*, 29 Conn. 602; *Rogers v. Atkinson*, 1 Kelly, (Ga.) 13; *Simonton v. Liverpool*, 51 Ga. 80; *Mitchell v. Univ. Life Ins. Co.*, 54 Ga. 290; *Mathison v. Wilson*, 87 Ill. 52; *Rigsbee v. Bowler*, 17 Ind. 167; *Hubbell v. Ream*, 31 Ia. 293; *Todd v. Allen*, 18 Kan. 543; *Davis v. Parrish*, Little's Sel. Cas. (Ky.) 153; *Gaines v. Bryant*, 4 Dana (Ky.) 398; *Stark v. Wilson*, 3 Bibb, 476; *Courtenay v. Fuller*, 65 Me. 158; *Wiggin v. Goodwin*, 63 Me. 689, citing cases; *Whittington v. Farmers' Bank*, 5 H. & J. 489; *Watkins v. Hodges*, 6 id. 38; *Mac-tier v. Wirgman*, 4 H. & J. 578; *Cummings v. Arnold*, 3 Metc. 486. See *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Leathe v. Bullard*, 8 Gray, 545; *Dean v. Colt*, 99 Mass. 485; *McCorkle v. Brown*, 9 Sm. & M. 167; *Grafton Bank*

v. Woodward, 5 N. H. 107, citing authorities; *McMurphy v. Garland*, 47 N. H. 311; *King v. Morford*, Sax. (N. J.) 280; *Gary v. Hull*, 11 Johns. 441; *Hasbrouck v. Tappen*, 15 Johns. 200; *Barnard v. Darling*, 11 Wend. 30; *French v. New*, 28 N. Y. (1 Tiff.) 149; 20 Barb. 481; *Vibus v. Wirting*, 2 Yeates, 350; *McCombs v. McKennan*, 2 W. & S. 216; *Goucher v. Martin*, 9 Watts, 107; *Renshaw v. Gans*, 7 Pa. St. 118; *Meason v. Kaine*, 63 Pa. St. 335; *Malone v. Dougherty*, 32 Leg. Int. 449; *Maxwell v. Wallace*, 1 Busbee, Eq. Rep. 251; *Cornwell v. Spence*, 1 Harp. Ch. 258; *Bryan v. Hunt*, 4 Sneed, 543; *Heth v. Woolridge*, 6 Rand. 607; *Phelps v. Seely*, 22 Gratt. 573. See *Wharton on Contracts*, §§ 661, 865, 690, 870; 5 Rob. Pract. 738.

(b) 5 B. & Ad. 58.

(c) *Piatt's Administrator v. United States*, 22 Wall. 506; *S. C. sub nom. Grandin v. United States*, 10 Ct. of Cl. 172, citing *Emerson v. Slater*. See *Swain v. Seamens*, 9 Wall. 271; *Hewitt v. Brown*, 31 Minn. 165. See *Hogan v. Crawford*, 31 Tex. 634; *Bryan v. Hunt*, 4 Sneed, 546, citing authorities.

(d) *Mayor of New York v. Butler*, 1 Barb. 339. See *McFadden v. O'Donnell*, 18 Cal. 160.

In a later section the subject of specialties will be taken up, and there the point of the dignity of certain instruments will be considered. It may be enough to say here that all agreements unsealed are of equal dignity, whether written or unwritten, and therefore the modification or discharge of a written contract by a subsequent oral one is no infringement of the principle that the same solemnities which are necessary to the execution of a contract are necessary to its change or dissolution.(e) And it has been expressly decided that simple contracts in writing can be changed or waived by a subsequent oral agreement.(f) Under the civil law this present question has been found as intractable as with us; it has been said that under the French code oral contemporaneous evidence is not admissible to qualify what is written, but whether oral proof of a subsequent partial or total extinguishment is admissible may be doubted, the French text writers being divided; in contracts as to chattels of a price below the sum named in the exception of the Statute of Frauds, the evidence is admissible.(g) In Louisiana the general rule prevails.(h)

§ 441. The agreement which makes the change must be a new and distinct contract.(i) Where a note is secured by mortgage, taking a new note does not of itself operate to discharge the lien,(j) which it has also been said must be in substitution of the old contract, and not merely to add new terms;(k) whether there is any value in this last distinction may be doubted.(l) Where a new contract is inoperative in itself it will not rescind the previous one, though if it had been operative its effect would have been to rescind.(m) The proof of the new contract must be clear, positive, and above suspicion.(n)

(e) *Bryan v. Hunt*, 4 Sneed, 546;
Grafton Bank v. Woodward, 5 N. H.
107.

(f) *Anon.*, 5 Vin. Abr. 522, pl. 38;
Allen v. Sowerby, 37 Md. 411; *Mitch-*
ell v. Univ. Life Ins., 54 Ga. 290.

(g) *Leblanc v. Rascoin*, 4 Rev. Leg.
603; which see, for an erudite citation of
authorities.

(h) *Cain v. Pullen*, 34 La. Ann. 517.

(i) *Adler v. Friedman*, 16 Cal. 138;
and upon a new consideration see *post*;
see *Hogan v. Crawford*, 31 Tex. 634.

(j) *Lippold v. Held*, 58 Mo. 213.

(k) *Id.*; see opinion of Bramwell, J.,
in *Sanderson v. Graves*, L. R. 10 Exch.
236; 44 L. J. Exch. 210.

(l) See *Courtenay v. Fuller*, 65 Me.
158; *Malone v. Dougherty*, 79 Pa. St. 46.

(m) see *Noble v. Ward*, L. R. 1
Exch., 121.

(n) *Falls v. Carpenter*, 1 Dev. & Bat.
Eq. 273; *Lippold v. Held*, 58 Mo. 213;
McKinstry v. Runk, 1 Beas. 60; *Mc-*
Grann v. North Leb. R. R., 29 Pa.
St. 83.

Loose and casual declarations of one party made apart from the other, and making no allusion to a change of the writing, are insufficient.^(o)

§ 442. The older doctrine of the law is summed up in the apothegm: "*Nihil tam conveniens est naturali æquitati unumquodque dissolvi eo ligamine quo ligatum est*;"^(p)

General rule
denied or
modified.

and it has been said that a subsequent oral contract cannot change a previous written one, but it is believed that all or nearly all of the cases which bear that appearance are susceptible of an explanation which would reconcile them with the well-settled law.^(q) At one time even in Massachusetts it was said that a subsequent *executory* oral agreement to vary the terms of a written contract was not operative; but whether a complete waiver might be so made was not decided.^(r) By the law of Scotland a written agreement cannot be waived or varied by words only, and if the permitted waiver or variation rests entirely in parol there remains a *locus pœnitentiæ* to the person who has consented to the waiver or variation. It cannot be enforced against him.^(s)

§ 443. The following are some examples of a valid subsequent oral modification of a written contract. The first is, in reality, not affected one way or the other by the rule in question: There was an agreement in writing, and one of the contracting parties and a third person agree by parol that its stipulations shall extend to them; in an action between the two last, the written agreement is competent evidence and con-

(o) *Smith v. Garth*, 32 Ala. 368.

(p) "*Conveniens*," not meaning "convenient," but "suitable" or "proper," as in the phrase "*La ley veut plutôt souffrir un mischief qu'un inconvenience*," or the word "*convenant*" in eighteenth century French.

(q) See *Harris v. Goodwyn*, 2 Sc. N. R. 459; *Brock v. Sturdivant*, 12 Me. 81; see also *Beach v. Covillard*, 4 Cal. 315; *Rex v. Warden*, 2 M. & R. 24; *Chesley v. Frost*, 1 N. H. 147; *Dana v. Hancock*, 30 Vt. 619; *Cutler v. Smith*, 43 Vt. 577; *McCombs v. McKennan*, 2 W. & S. 216; *Garver v. McNulty*, 39 Pa. St. 485; *Malone v. Dougherty*, 32 Leg. Int.

449. In *Chambers v. Board of Education*, 60 Mo. 379, it was said that as to matters as to which the written contract made no provision, the subsequent oral contract was valid. In *Sutton v. Tyrrell*, 1 Vt., 91, it was held that a written submission could only be revoked by writing or by legal implication.

(r) *Adams v. Nichols*, 19 Pick. 278.

(s) *Bargaddie Coal Co. v. Wark*, 3 Macq. 477, per Lord Chelmsford; see *North British Railway Co. v. Sligo*, 1 Sess. Cas. (4th Ser.) 309, as to how far a writing altered by parol is within a statute of limitations relating to writings.

nected with it by parol. "It is not varying, or even explaining the writing. It is simply proving that the plaintiff and defendant said we agree by word of mouth exactly as Mr. Cowan and Mr. Davidson have agreed on paper."(*t*) A written lease not under seal for one year may be changed by an oral contract.(*u*) A written order given by the plaintiff to the defendants, stockbrokers, to sell at certain figures stock, which the latter were carrying for the former, may be orally modified at a subsequent date.(*v*) Where the defendant had agreed in writing with the plaintiff to become sole agent for the sale of his book, and agreed to take one thousand copies annually, the subsequent verbal agreement was that the defendant should print the book also at certain rates. The action was brought to compel an account to be made of books printed and sold by the defendant under the contract, and to compel him to pay the agreed price for one thousand copies a year, though numbers sold might actually have been less, it was held that the plaintiff was entitled to the latter relief as incident to the accounting.(*w*) Where there had been an agreement for the delivery of a chattel as security, it is competent to show by oral evidence that the parties had made a further agreement as to the place for the contract to be carried into effect, and also for the appointment of an agent to receive the money.(*x*) A subsequent oral alteration of a written contract made by seaman with a master is good.(*y*) Parol evidence is admissible to prove that a written order entered among the proceedings of the board of directors of a bank was rescinded and annulled by a subsequent verbal order of which no minute in writing was made.(*z*) Waiver by parol of a forfeiture of a fire insurance is good.(*a*) Where a policy of insurance provided that no condition could be waived save in writing, signed by the secretary, it was held that a verbal notice to an agent accepted by him was sufficient;(b) and as a general rule a contract of insurance may be va-

(*t*) *Hargrave v. Davidson*, 2 Dev. 535.

(*y*) *Vibus v. Wirting*, 2 Yeates, 350.

(*u*) *Flanders v. Fay*, 40 Vt. 316; see *Lanyon v. Toogood*, 13 N. & W. 27.

(*z*) *Whittington v. Farmers' Bank*, 5 H. & J. 489; see *Mactier v. Wirgman*, 4 H. & J. 578.

(*v*) *Clarke v. Meigs*, 10 Bosw. 337; see *Burkett v. Taylor*, 86 N. Y. 618; see *Dos Pas. Stock Broker*, 165 n. 3.

(*a*) *Georgia Ins. Co. v. Kinser*, 28 Gratt. 88.

(*w*) *Bonn v. Steiger*, 21 Hun, 220.

(*b*) *Carroll v. Charter Oak Ins. Co.*, 10 Abb., Pr. N. S. 166; 40 Barb. 292; 38 Barb. 402.

(*x*) *Cummings v. Putnam*, 19 N. H. 569.

ried by a new oral agreement.(c) It has been held in Louisiana that an insurance company may by parol waive a condition in the policy which was intended for their own protection, that the insurance shall not be binding until actual payment of the premium.(d) If the insurance contract is required by law to be in writing, a different rule applies.(e) Where the principal in a contract of suretyship is given time by a subsequent oral contract the surety is discharged.(f) Parol evidence is admissible of various alterations pending the acceptance and completion of the written contract, because until there was final acceptance there was no written contract to be modified.(g) An attorney having the power to "rescind any contract of sale" may rescind verbally such contract, though written.(h)

§ 444. The distinction between oral evidence of a stipulation contemporaneous with or prior to the writing and a subsequent contract should be always kept in view. Evidence of the former is rejected because the writing is presumed to contain all the agreement between the parties, and any other rule would do away with the advantage of putting the contract into writing. In Pennsylvania, where this principle has been trifled with, it was recently said from the bench that the only good of a writing is to enable the other side to know what he has to contradict. Where the oral variation is posterior in point of time to the writing, the presumption that the latter is in lieu of the verbal negotiations does not, of course, apply. Thus it has been held that verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract, but the rule is otherwise as to subsequent agreements.(i) If plaintiff count upon a writing, and the plea show an agreement contem-

(c) *West Chester Ins. Co. v. Earle*, 33 Mich. 153.

(d) *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214.

(e) *West Chester v. Earle*, 33 Mich. 153; *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 290; *Simonton v. Liverpool Co.*, 51 Ga. 80.

(f) *Buck v. Smiley*, 64 Ind. 431; see *Phillips v. Rounds*, 33 Me. 357;

Bever v. Butler, Wright Ch. 367 (a bond); see, however, as to a specialty debt, *Carr v. Howard*, 8 Blackf. 190.

(g) *Stewart v. Eddowes*, L. R. 9 C. P. 313; 43 L. J. C. P. 204; *Goss v. Lord Nugent* not applying.

(h) *Bartlett v. Looney*, 3 Vict. L. Rep. Eq. 14.

(i) *Emerson v. Slater*, 22 How. 41; see *Heatherly v. Record*, 12 Tex. 49;

poraneous and modifying its terms, it, *i. e.* the plea, must show that this agreement also was in writing.(j) The rule is the same under the civil law.(k) It is well settled, it has been said, that the terms of a written contract cannot be varied by any previously executed contract written or parol, nor by any contemporaneous parol contract.(l) To debt on judgment, a plea that there was a verbal agreement not to use the judgment according to its legal operation, which agreement had been made at the time of the trial of the original action, is not good.(m) So an oral agreement contemporaneous with a note to extend the time of payment of the note.(n) But it is otherwise as to a verbal agreement made subsequent to the written contract, though on the same occasion, and before the parties separate; the written contract contemplated a supplementary contract and the verbal agreement was consistent with it.(o) It is not practicable to consider in this place the exception, based on the equitable principles of fraud and mistake, under which even contemporaneous oral evidence is admitted in contradiction of a writing.(p)

§ 445. The modifying contract must be upon a new, distinct, and valid consideration,(q) whether the new contract is executed or executory.(r) It has been said that the new consideration is additional to and supplementary of the old.(s) But a mere supposition that the new contract is founded on the continuation or extension of the consideration of

The consideration of the new contract.

Chambers v. Board of Educ., 60 Mo. 379; *Bryan v. Hunt*, 4 Sneed, 546; *Kelleran v. Brown*, 4 Mass. 443; *Wharton v. Miss. Car Co.*, 1 Mo. App. 577; *Wemple v. Knoff*, 15 Minn. 440.

(j) *Peddle v. Donnelly*, 1 Col. 421.

(k) *Leblanc v. Roscoin*, 4 Rev. Leg. 603, citing many authorities.

(l) *Todd v. Allen*, 18 Kan. 545; see *Self v. King*, 28 Tex. 554.

(m) *Walker v. Kendall*, Hardin (Ky.) 404.

(n) *Ockrington v. Law*, 66 Me. 551; see *Erwin v. Saunders*, 1 Cow. 250.

(o) *Field v. Mann*, 42 Vt. 61.

(p) See the chapters on these subjects; see *Howland v. Blake*, 97 U. S. 624.

(q) *Anon.*, 5 Vin. Abr. 522, pl. 38;

Emerson v. Slater, 22 How. 41; *Henning v. U. S. Ins. Co.*, 47 Mo. 425; *Wharton v. Missouri Car Co.* 1 Mo. App. 577; see *Hill v. Blake*, 16 Jo. & Sp. 254; *Flanders v. Fay*, 40 Vt. 313; *Cutler v. Smith*, 43 Vt. 577; *Bryan v. Hunt*, 4 Sneed, 546; *Thurston v. Ludwig*, 6 Ohio St. 1; *Adler v. Friedman*, 16 Cal. 138; *McKinstry v. Runk*, 1 Bea. 60; *Courtenay v. Fuller*, 65 Me. 158; *Malone v. Dougherty*, 79 Pa. St. 46; *Hogan v. Crawford*, 31 Tex. 635; *Shepherd v. Wyson*, 3 W. Va. 46; see *Walker's Am. Law*, 460 (bottom of note). See *infra*, § 446.

(r) *Wharton v. Anderson*, 10 No. West. Rep. 860 (S. C. Minn.)

(s) *Willey v. Hall*, 8 Ia. 62.

the prior written agreement is not enough.(t) Where the new contract is without consideration it is mere *nudum pactum*.(u) Mutual promises by one party to deliver and by the other to accept a payment at a later date than that called for by the written contract form a good consideration for the new agreement.(v) Where a written contract for the sale of cattle at a certain price was subsequently modified by a verbal agreement by which the payment was to be made by drafts of the commission dealer who was to sell the cattle for the vendee. It was in evidence that another firm was willing to handle the cattle for \$50 less than the commission dealer selected, but as the vendor preferred him, they made the parol agreement as stated. Only one lot of cattle was delivered, and the vendee brought suit to recover the earnest money paid by him at the inception of the contract. It was held the subsequent parol agreement was based upon sufficient consideration, and was therefore sufficient to change the written contract.(w) It has been held in Alabama that a written contract may be modified by parol without any new consideration, but the additional (x) subsequent term was immediately after the main agreement. It has been said in New York that the time for the performance of a written agreement may be extended by parol without any new consideration,(y) and this is said to be well settled in that State.(z) In Wisconsin it has been held that this is true of contracts not within the Statute of Frauds.(a)

§ 446. The principle which establishes the rescission of the written contract is in many cases that of the new one being in the nature of an accord and satisfaction, the oral contract being executed.(b) There is a distinction which is of an old date between an oral modification or discharge of a contract before breach or one thereafter.

The modification whether before or after breach—accord and satisfaction.

- | | |
|---|---|
| (t) Thurston v. Ludwig, 6 Ohio St. 1. | (y) Clark v. Dales, 20 Barb. 42. |
| (u) Crawford v. Millsbaugh, 13 Johns. 87; Case v. Barber, T. Raym. 450; Merkle v. Wehrheim, 32 Ill. 534. | (a) Burt v. Saxton, 1 Hun, 551, 4 Th. & C. 109. |
| (v) McNish v. Reynolds, 95 Pa. St. 483. | (a) Brown v. Everhard, 52 Wis. 205. |
| (w) Shaffer v. McKanna, 24 Kan. 22; the seventeenth section of the Statute of Frauds is not in force in Kansas. | (b) Hall v. Stewart, 5 Day, 431; see <i>infra</i> ; see Fortescue v. Brograve, Styles, 8; Milward v. Ingram, 2 Mod. 44; 1 id. 205; 1 Freem. 95; Taylor v. Hilary, 1 Cr. M. & R. 741; Levy v. Very, 12 Ark. 148. |
| (z) Glover v. McGilvray, 63 Ala. 510. | |

As to the former, the rule, in accordance with what has already been said, is that the oral change is good, but that the damages accruing on the actual breach of an agreement cannot be orally released. Thus in the reign of Charles I. it was held that a contract verbal may be verbally discharged before breach; simply to plead *Exoneravit eum*, without showing how, is good; "*eodem modo quo oritur eodem modo dissolvitur*." (c) In a case in Styles it was held that an oral or parol agreement before a breach of it may be discharged by parol and so pleaded: but *secus* after breach. (d) So where there was a promise to pay in consideration of exchanging horses, the defendant cannot plead a parol discharge before action brought, for, the money being due immediately, the promise to pay was broken. Query, if he had pleaded such a discharge before any request of payment, whether it had been good. (e) If there be an *assumpsit* to do a thing and there is no breach of the promise it may be discharged by parol, but if it be once broken then it cannot be discharged without release in writing. (f) Where there was a declaration that the defendant guaranteed the plaintiff supplying goods to one H., and breach, and a plea that before breach it was agreed between plaintiff and defendant that plaintiff should supply goods to H., and that they should be paid for at the end of three months by a bill at four months, to be accepted by the defendant, which agreement the plaintiff before breach accepted in discharge of the former agreement, and released defendant from performance thereof; and on demurrer it was held, that the second agreement was an original undertaking not required to be in writing by the Statute of Frauds, or an accord and satisfaction requiring an averment of performance to let it in as a defence to the action as a substituted contract. (g) The rule that a written contract before breach may be changed or released by parol is supported by good authority in the United States. (h) After breach the state of affairs

(c) Langdon v. Stokes, Cro. Car. 383; see Conier's and Holland's Case, 2 Leo. 214; Knight v. Chaplen, 2 Sid. 77; Bleeke v. Grove, 1 id. 177.

(d) Fortescue v. Brograve, Styles, 8.

(e) Edwards v. Weeks, 2 Mod. 259; 1 id. 262, citing Langdon v. Stokes.

(f) Milward v. Ingram, 2 Mod. 44; 1 id. 205; 1 Freem. 95.

(g) Taylor v. Hilary, 1 C. M. & R. 741.

(h) Emerson v. Slater, 22 How. 41; Swain v. Seamens, 9 Wall. (U. S. S. C.) 271; Piatt's Admr. v. United States, 22 id. 506; S. C. *sub nom.* Grandin v. United States, 10 Ct. of Cl. 172; Hewitt v. Brown, 21 Minn. 165; Buel v. Miller, 4 N. H. 196; Grafton Bank v. Wood-

is different; thus it has been said that "it is not easy to understand how it can with strict accuracy be said that a contract is modified after breach. Before breach it is capable of modification in a legal manner, but after a breach the performance of the original contract becomes impossible. A new contract may be made, but the old one for all purposes of performance is at an end; and accordingly the cases of oral modification of written contracts in the books are cases of a modification before breach, whilst performance is still possible." (i) The question of a total release or discharge differs again from a mere modification, and there are two currents of doctrine which sometimes run parallel with each other and sometimes in opposition, which are to the effect, one, that an oral discharge of a written contract may be good, though of a simple change in its terms written evidence would be required; the other to the effect while an oral change or discharge of a contract before breach is good, a discharge of the damages due upon a broken contract requires a sealed or at least a written release.

§ 447. A complete waiver of a written contract may be said to be in modern law valid, though oral. (j) But proof of intention

ward, 5 id. 108, citing numerous authorities; *Perrine v. Cheeseman*, 6 Halst. 177; *Long v. Hartwell*, 5 Vroom, 121, citing cases; *Hubbell v. Ream*, 31 Ia. 293; *Vastine v. Wyman*, 5 Mo. App. 598; see *Legge v. Laurentian R. Co.*, 24 Low. Can. Jur. 98; *Lanyon v. Toogood*, 13 M. & W. 27.

(i) *Wharton v. Missouri Car Foundry Co.*, 1 Mo. App. 577: *Query*, however, as to how much effect was given to the fact that the new contract had no consideration. In a not dissimilar case of *Hill v. Blake*, 16 Jo. & Sp., 254, the court, holding that the new contract should have a consideration and that the old one was over, the time for performance being past, said: It must be kept in mind that the conversation between the parties, on this point, was in February, when the possibility of the plaintiff performing his written contract by making a January shipment had passed. All executory obligations had

ended. The plaintiff was not then bound to accept any delivery. There was, in fact, no contract existing, and therefore none that could be performed, and the time for performance of which could be extended to create a new obligation on the part of the plaintiff to accept any iron from the defendant, it was necessary that a new contract should be made. It is clear that any new oral contract would be invalid under the Statute of Frauds.

(j) *Wiggin v. Goodwin*, 63 Me. 389; *Botsford v. Burr*, 2 Johns. Ch. 405; *Fleming v. Gilbert*, 3 Johns. 528; *Gary v. Hull*, 11 Johns. 441; *Erwin v. Saunders*, 1 Cow. 250; *Schultz v. Bradley*, 57 N. Y. 646, 4 Daly 29; *Vibur v. Wirting*, 2 Yeates, 350; *McCombs v. Kennan*, 2 W. & S. 216; *Malone v. Dougherty*, 32 Leg. Int. 449; *Bullard*, 8 Gray, 545; *Morrill v. Colehour*, 82 Ill. 625; *Mactier v. Wirgman*, 4 H. & J. 578; *Watkins v. Hodges*, 6

to release must be clear.(k) Where the new contract is executed it is certainly valid,(l) as where a contract under seal to sell land is orally rescinded, and the land is conveyed to a third person as agreed in the contract of rescission,(m) a discharge *pro tanto* has been held to be good.(n) So it has been said that if a written contract can be discharged altogether by a subsequent agreement, not in writing, it will be difficult to conceive, it is imagined, any good reason why its terms may not be altered by such an agreement.(o) Where a bill of sale is shown to be but as a security, a payment of the debt proper will deprive the former of all its validity.(p) See § 452 for a denial of the validity of an oral discharge of a written contract, even though the release be total.

It has been held that a parol agreement to release is invalid,(q) and that a debt of record cannot be released by parol.(r) There is authority for saying that an oral release without more is not now efficacious to discharge the liability, which has been incurred by one who has violated his agreement. Thus in a case in *Styles*, already cited, it is held that after breach it cannot be pleaded in discharge without satisfaction also pleaded, but a discharge may be pleaded by deed, be the covenant by parol or by deed, after a breach and without satisfaction.(s) And thus in Vermont it has been held, that "after a simple contract is broken and damage accrued thereby, it cannot be discharged by parol without satisfaction or some consideration, though it may before. But if the new agreement is upon good consideration and performed by the defendant, it is a satisfaction and a defence, and it makes no difference that the prior agreement is in writing and the new agreement

Total discharge or release.

Harr. & J. 38; *Whittington v. Farmers' Bank*, 5 H. & J. 489; *Whiting v. Heslep*, 4 Cal. 327; *King v. Morford*, Sax. (N. J.) 280; *Hargrave v. Davidson*, 2 Dev. 535; *Jervis v. Berridge*, 42 L. J. Ch. 518; see also Co. Litt. 218 (a); *Shep. Touch.* 153; 2 Cruise Dig. (Greenl. Ed.) Tit. 13 c 2, § 25 n.; as to parol accord and satisfaction, see *Milward v. Ingram*, 2 Mod. 44, 1 id. 205, 1 Freem. 95.

(k) *Lippold v. Held*, 58 Mo. 318.

(l) *Carpenter v. Murphree*, 49 Ala. 84, citing cases; *Johnson v. Worthy*, 17 Ga. 420.

(m) *Phelps v. Seeley*, 22 Gratt. 585.

(n) *Willes v. Hall*, 8 Ia. 62.

(o) *Grafton Bank v. Woodward*, 5 N. H. 108.

(p) *Nillar v. Northman*, 9 Chic. Leg. News, 391.

(q) *De Zeng v. Baily*, 9 Wend. 336.

(r) *Terhune v. Colton*, 2 Stockt. 22.

(s) *Fortescue v. Brograve, Styles*, 8.

verbal.(t) A stipulation in an insurance policy that its conditions could only be waived in writing, &c., was held to apply only to such conditions as related to the formation and continuance of the contract of insurance, and not to apply to such as were to be performed after the loss has occurred, in order to enable suit to be brought, as proof of notice of loss, &c.(u) How far the older rule requiring a release under seal still prevails is not easy to determine: as this subject is not strictly one cognate to that of the Statute of Frauds, it may be enough to say that the modern law is generally satisfied with a written, parol release in those cases in which a mere oral contract is not admissible.(v) A parol writing contemporaneous with a deed of land is not at law a good defeasance.(w) It has, however, been strictly held that a release not under seal is not valid.(x) But oral proof, it was said in the case in Cowan, of the payment of a debt in mortgage, is a good defence to an ejectment brought by the mortgagee. An executed contract must, it has been held in England, have a release under seal.(y) So where there was a special plea by one of the defendants, after the death of the other, that since the note fell due the plaintiff had discharged that other, but the plea omitted to state that the release or discharge was under seal: on demurrer judgment was given for the plaintiff, there being no consideration shown for the release.(z)

§ 448. Before taking up the general subject of the subsequent oral modification of a specialty, it may be better to consider, in pursuance of the present line of thought, how far the release of a written contract under seal is affected by the fact that the release is given before or after the breach of the agreement. Unlike simple contracts, an oral or unsealed release of a specialty is invalid before, though good after breach. A covenant for the payment of a sum certain, although the payment does not accrue until after notice given, cannot be discharged by parol before breach.(a) An oral agreement to reduce the rent

(t) *Cutler v. Smith*, 43 Vt. 581. But the old law was otherwise; see *Edwards v. Weeks*, 2 Mod. 259.

(u) *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 310; see *Carroll v. Charter Oak Ins. Co.*, 10 Abb. Pr., N. S. 166.

(v) See *Develin v. Riggabee*, 4 Ind. 464; *Thomason v. Dill*, 30 Ala. 444.

(w) *Kelleran v. Brown*, 4 Mass. 443.

(x) *Jackson d. Roosevelt v. Stackhouse*, 1 Cow. 122; *Headley v. Goundry*, 41 Barb. 279; *Dillingham v. Estill*, 3 Dana, 21; *Davis v. Bowker*, 1 Nev. 487.

(y) *Foster v. Dawber*, 6 Exch. 839.

(z) *Corbett v. Lucas*, 4 McCord, 323.

(a) *Spence v. Healey*, 8 Exch. 668;

reserved by a lease under seal being executory and verbal, cannot before breach modify the original contract under seal.(b) Where there was a declaration or sealed agreement to build a vessel before a certain time and according to a certain model, and a plea that before breach the defendant was ordered by the plaintiff to build the vessel of a larger size, which he accordingly did, consuming in that way more time, which was the breach complained of. It was held no answer to the declaration and bad on demurrer. "Perhaps accord and satisfaction might have been pleaded successfully; but this plea is not of that character," said the court.(c) And in the same tribunal, the following case was distinguished from that just stated. There was an agreement under seal to purchase for £375 all the profits arising from stock belonging to defendant and in his possession, during two years. In an action to recover back the sum so paid, the declaration alleged that the defendant, before the expiration of the two years, sold the stock to another, and the plea was that the stock had become valueless, and that plaintiff had by parol authorized the sale; this on demurrer was held good, the action not arising from any breach of the covenant, which provided not that defendant should not sell the stock, but that he should pay over to plaintiff the profits thereof, and so the rule of *Gaskin v. Counter* did not apply.(d) It has been said that the law is understood to be well settled that a covenant under seal, and not broken, cannot be discharged by a parol agreement.(e) A parol agreement to dispense with a covenant in a deed before breach is no bar to a suit on the covenant.(f) So before breach to validate a new contract, a valid accord and satisfaction of the previous one must be shown, and to a bond

see *Beach v. Covillard*, 4 Cal. 315; *Smith v. Trowsdale*, 3 E. & B. 83; *McMurphy v. Garland*, 47 N. H. 311; *Gwynne v. Davy*, 1 M. & G. 869, 871; *Kuhn v. Stevens*, 7 Roberts. 544. *Canham v. Barry*, 15 C. B. 597.

(b) *Coe v. Hobby*, 72 N. Y. 114, citing cases; see *Delacroix v. Bulkley*, 13 Wend. 73, citing *Kaye v. Waghorne*, 1 Taunt. 430; *Suydam v. Jones*, 10 Wend. 184; *Barnard v. Darling*, 11 Wend. 30.

(c) *Gaskin v. Counter*, 6 U. C. C. P. 99, citing *Rippinghall v. Lloyd*, 5 B. & Ad. 742; *Spence v. Healey*, 8 Ex. 668; *West v. Blakeway*, 2 M. & G. 729; *Berwick v. Oswald*, 1 E. & B. 295; (f) *Hogancamp v. Ackerman*, 4 Zab. 133.

(d) *Miller v. Hemphill*, 9 Ark. 489; *Delacroix v. Bulkley*, see *French v. New*, 28 N. Y. 150; *Suydam v. Jones*, 10 Wend. 180, citing *Kaye v. Waghorne*; *Preston v. Christmas*, 2 Wils. 86; *Blake's Case*, 6 Co. 43; *Alden v. Blague*, Cro. Jac. 99.

(e) *Hogancamp v. Ackerman*, 4 Zab. 133.

accord and satisfaction can be pleaded by deed only.(g) To dissolve a covenant something of equal solemnity must be shown. If the breach has accrued, accord and satisfaction is a good plea, but not for breaches not yet taken place;(h) and after breach the law is as just stated.(i) After breach of a sealed contract, the parties to it may discharge any liability upon it by entering into a new agreement having reference to the same subject-matter, or by any valid parol executed contract.(j) Where a defendant who was liable for rent due and to come due on a sealed lease, gave in settlement a note of a third person and this note was not paid, it was held in an action on the lease, that it was a question for the jury whether the note was received in payment or not, the covenant being discharged by the oral agreement if fully executed.(k) Oral proof of the accord and satisfaction of a claim due under a mortgage may be received; it has been held in New York good *semble* only as a defence.(l) The apparent inconsistency of holding that an oral release of a broken parol contract is invalid, while that of a like specialty is valid, can be reconciled by the qualification that in both cases an accord and satisfaction or a contract equivalent thereto, and based on a consideration, is equally necessary; in a word, while before breach the rule is different as to the two classes of cases, after breach there is no distinction between them.

§ 449. To take up now the general subject of the subsequent oral modification or discharge of a specialty, it may be said that such a contract is not provable orally.(m) Where a contract is in an instrument under seal, it

Rule as to specialties—generally.

(g) *Levy v. Very*, 12 Ark. 148; see *Kaye v. Waghorne*, 1 Taunt. 429.

(h) *Harperv. Hampton*, 1 H. & J. 622, 675; see also *Cabe v. Jameson*, 10 Ired. Law, 193; *McMurphy v. Garland*, 47 N. H. 316; *Cortenant v. Hunt*, 8 Taunt. 596; *Keeler v. Salisbury*, 27 Barb. 485.

(i) *Delacroix v. Bulkley*, 13 Wend. 71, distinguishing *Dearborn v. Cross*; see *Kuhn v. Stevens*, 7 Roberts. 544; *Suydam v. Jones*, 10 Wend. 180; *Fortescue v. Brograve, Styles*, 8; *Edwards v. Weeks*, 2 Mod. 259.

(j) *Miller v. Hemphill*, 9 Ark. 489;

where a covenant to give an unincumbered title was broken by there being an incumbrance on the land the day fixed upon in the covenant, and there being therefore a breach of the covenant an oral rescission of the written agreement to convey was valid. Citing *Goss v. Ld. Nugent*; *Delacroix v. Bulkley*; *Friess v. Rider*, 24 N. Y. 367; and *Benedict v. Lynch*.

(k) *Lawrence v. Barker*, 8 N. Y. W. Dig. 553; (N. Y. C. P.)

(l) *Keeler v. Salisbury*, 27 Barb. 485.

(m) *Sellers v. Bickford*, 8 Taunt. 31; *Stead v. Dawber*, 10 Ad. & Ell. 63;

seems to be settled in England that it cannot be varied by a subsequent parol contract.⁽ⁿ⁾ In a Virginia case it was said that a valid obligation created by an instrument under seal and not performed, can only be discharged at common law by a sealed instrument. In certain cases the statutes have allowed sealed obligations to be discharged by other matters; in these particular cases such matters may be pleaded and proved at law. But it is a general principle that in an action on an instrument under seal, no parol agreement can be pleaded in bar unless a statute gives the defence.^(o) So a contract under seal can only, it has been said, be modified by an *executed* oral agreement.^(p) An executory contract under seal cannot be modified or released by an executory oral agreement.^(q) In an action upon a contract under seal against a surety, plea that after covenant was made, and after the moneys were advanced, the debtor and creditor agreed that if the former would make certain arrangements, the latter would discharge the surety, and that the arrangements were accordingly made, it was held that this plea being either taken to set up in effect a parol agreement to discharge the defendant from the contract under seal, or to assert that such a consequence resulted from the facts stated,

West v. Blakeway, 2 M. & G. 753; see Mill Dam Foundry v. Hovey, 21 Pick. 417; McMurphy v. Garland, 47 N. H. 316; Baker v. Whiteside, Breese, 132; Barnet v. Barnes, 73 Ill. 216; Perrine v. Cheeseman, 6 Halst. 177; Buel v. Miller, 4 N. H. 196; Munroe v. Perkins, 9 Pick. 298; Dickerson v. Commissioners, 6 Ind. 128; Bryan v. Hunt, 4 Sneed, 543; Cabe v. Jameson, 10 Ired. 193; Barnes v. Lloyd, 1 How. (Miss.) 584.

(n) Grafton Bank v. Woodward, 5 N. H. 108, citing Davey v. Prendergrass, 5 B. & Ald. 187; Littler v. Holland, 3 T. R. 590; Fleming v. Gilbert, 3 Johns. 528.

(o) Steptoe v. Harvey, 7 Leigh, 501.

(p) Jenks v. Robertson, 2 Th. & C. 255. See *infra*, a submission to arbitration is not such an execution. French v. New, 28 N. Y. 150.

(q) Smith v. Lewis, 24 Conn. 624; Barnet v. Barnes, 73 Ill. 216; see Barnard v. Darling, 11 Wend. 30, in which Judge Nelson said that whether the performance of covenants contained in a sealed instrument can be discharged by a parol agreement between the parties or not, is a question not involved in this plea. The cases seem to leave it in a little obscurity or doubt. The law was once understood to be settled that an unexecuted parol agreement could have no such effect: *eodem modo oritur eodem modo dissolvitur*, 5 Bac. tit. Release, 682; 1 id. 43; Cro. Eliz. 697; Cowp. 47; 2 Sand. 48, n. 1; and the above cases in this court do not necessarily conflict with this principle. But it is quite certain that a parol agreement between the parties, without a good and sufficient consideration, cannot have the operation given it in the plea.

independent of the alleged agreement, could not in either case be a legal defence to the action, and that the remedy of the surety, if any, was in equity.(r) A release under seal has been held not to be necessary to discharge the contract under seal.(s) See *infra* as to how far the integrity of this rule has been broken in upon.

§ 450. The following are some examples of the invalidity of the subsequent modification or discharge of specialties.
 General ex- Thus a parol license was no defence to a bond condi-
 amples. tioned that the defendant should not open a shop in a certain district.(t) So a covenant for the payment of money cannot be discharged without deed.(u) Where there was a lease containing a promise to buy within six years, the plaintiff paid part of price and would have paid the rest; to a bill for specific performance an oral abandonment was held to be no defence.(v) Under a verbal agreement for rescission of articles of sale and execution of a new bond and notes for balance of purchase-money, the old bond and notes were surrendered, but the vendor refused to carry out the verbal agreement or to give a bond for the deed, it was held to be no rescission of the original contract, and that the old agreement continued in force unaffected by the verbal contract, and specific performance of it may be decreed. The vendee was the plaintiff.(w) Where A was promised a loan of \$5000 and gave a note secured by deed of trust of real estate with confession of judgment; the day following, he applied to B the lender and payee of the note, who said he could only advance \$3000, which was accepted and a new note given for that amount with a confession of judgment, in which, however, there was made no reference to the previous note and deed of trust, it was held, that the agreement to lend \$5000 having fallen through, the power to sell for its repayment according to the trust deed also

(r) *McPherson v. Dickson*, 8 U. C. Q. B. 29, citing *Aldridge v. Harper*, 10 Bing. 123; *Davey v. Prendergrass*, 5 B. & Ald. 187; *Bulteel v. Jarrold*, 8 Pr. 467; *West v. Blakeway*, 2 M. & G. 750.

(s) *Thomason v. Dill*, 30 Ala. 444.

(t) *Sellers v. Bickford*, 8 Taunt. 31.

(u) *Rogers v. Payne*, 2 Wils. (C. B.) 376.

(v) *Wilkins v. Evans*, 1 Del. Ch. 157, citing cases; *West v. Blakeway*, 2 M.

& G. 729. To an action of covenant by the executors of a lessor against the lessee upon the covenant in a lease to yield up all improvements, the following oral agreement was no valid defence, viz., that the defendant having assigned to H., H. and the lessor agreed that a certain greenhouse which H. was to put up, he, H., could remove.

(w) *Mathison v. Wilson*, 87 Ill. 52.

failed, and could not be transferred to the smaller subsequent loan by parol agreement of the parties.(x) An endorsement not under seal on the back of a lease, agreeing to accept a less sum for rent, and evidence of payment and acceptance of a reduced sum for three months thereafter, are not admissible to vary the terms of the lease.(y) Where the plaintiff, a beneficiary entitled by decree of court to a certain share of a trust estate, gave the trustee a receipt in full under seal and took the trustee's note for the amount, and afterwards the note and the receipt were returned to the plaintiff and destroyed, it was held that the receipt having been under seal there could now be no recovery against the surety.(z) Time given by an oral contract to the principal debtor under a specialty, will not discharge the surety.(a) An alteration of a composition with creditors is not valid by parol.(b) So as to indenture of apprenticeship.(c)

§ 451. In the case of a submission to arbitration a revocation under seal is especially insisted upon by many authorities, though even in that instance equitable exceptions ^{Arbitration bonds, mortgages.} have certainly been allowed, the following statements will give an idea of the stricter rule. Thus it has been held unqualifiedly that such a revocation must be at least in writing,(d) or by legal implication.(e) Where there was an agreement under seal enlarged by parol subsequently as to its subject-matter (land), and an award made in accordance therewith, it was held that the award was void, being entire, and not being in accordance with the written submission,(f) and in many decisions a deed is required.(g) Even where the original submission was by parol,(h) where an oral submission named a new arbitrator, not named in the writing, the submission is not good as a statutory submission

(z) *Walker v. Carleton*, 97 Ill. 589: but see *Rex v. Titchfield*, Burr. S. C. 511. three judges dissented.

(d) *Sutton v. Tyrrell*, 10 Vt. 91; see

(y) *Loach v. Farnum*, 90 Ill. 368. *Woods v. Page*, 37 Vt. 352.

(z) *State v. Gost*, 44 Md. 341. (e) *Id.*

(a) *Carr v. Howard*, 8 Blackf. 190, citing

Bulte v. Jarrold, 8 Price, 467, etc.; 105 Mass. 397.

Davey v. Prendergrass, 5 B. & Ald. 187; (g) *Brown v. Leavitt*, 26 Me. 256;

see *Witmer v. Ellison*, 72 Ill. 301, citing

cases. *Wallis v. Carpenter*, 13 Allen, 19; *Mc-*

(b) *Emmett v. Dewhurst*, 3 Mac. & G. *Farlane v. Cushman*, 21 Wis. 404;

587; 21 L. J. N. S. Ch. 497; 15 Jur., *Evans v. Cheek*, 3 Hayw. 42; *Mullins*

1115. *v. Arnold*, 4 Sneed, 262.

(c) *Rex v. Warden*, 2 M. & Ry. 24; 125. (h) *Van Antwerp v. Stewart*, 8 Johns.

in Georgia, so as to be put on the record of the court.(i) Where there was a submission (under seal) to arbitration, and it was then verbally agreed to withdraw from the arbitrator a certain matter in controversy which matter accordingly was not passed on, it was held that as the submission was under seal it could be altered only in a similar manner.(j) Where there has been a submission under seal to arbitration, and the parties verbally agree that they will abide by a verbal award, this can only be binding if the submission would have been valid by parol, and where a writing is necessary to defeat or destroy the thing in demand, the submission and award must be in writing.(k) A submission to arbitration is not such an executed agreement as that being oral it can discharge a covenant; it is an *agreement* to do what the arbitrator may award.(l)

The revocation of a written submission must be in writing.(m) A mortgage cannot be altered by parol so as to include a larger amount.(n) Where a mortgage is overdue a promise to reduce the interest is, if acted upon, valid in equity. The mortgagor upon giving six months' notice could have paid off the mortgage; this he waived.(o) An invalid equitable mortgage cannot be validated by subsequent parol.(p)

It has been doubted whether payment will release a mortgage or other lien by deed without a formal release, though the lien itself is extinguished;(q) but there is nothing in the doubt. See *infra*.

§452. The strict rule requiring written or specialty evidence does not prevail in equity. Thus an oral variation of a deed is not valid at law, but is so in equity.(r) Where a bond creditor took his interest in advance an injunction was granted to stay an immediate suit for the principal sum, both

(i) *Jones v. Payne*, 41 Ga. 30.

(j) *Howard v. Cooper*, 1 Hill (N. Y.) 49.

(k) *French v. New*, 28 N. Y. 150; 20 Barb. 481; 2 Abb. Dec. 209, citing 2 Hill, 272; *Russell on Arbitr.*, L. L., 4th Series, vol. 38, p. 95, &c.; see *Woods v. Page*, 37 Vt. 252, however.

(l) *French v. New*, 28 N. Y. 150.

(m) *Sutton v. Tyrrell*, 10 Vt. 91.

(n) *Stoddard v. Hart*, 23 N. Y. 556; see *Milton v. Edgeworth*, 5 Bro. P. C. 313; see *Betts (Re)* 4 Dill, L. C. 97, hold-

ing that a mortgage is a mere lien for a debt, and may be extended as to time of payment by parol.

(o) *Lewis v. Levy*, 2 Vict. L. R. Eq. 114.

(p) *James v. Rice*, 1 Kay Ch. 245.

(q) *McCorkle v. Brown*, 9 Sm. & M. 167, citing *Wentz v. DeHaven*, *Davis v. Maynard*; see *Keeler v. Salisbury*, 27 Barb. 485.

(r) *Thames Iron Works v. Steam-Packet Co.*, 13 C. B. N. S. 358. In a North Carolina case, *Shelton v. Shelton*,

in favor of the principal debtor and of the surety; this was because the defence was not good at law.^(s) A parol agreement cannot be pleaded *in bar* of an action on a recognizance of bail in error. The agreement in this case was made by the plaintiff with the principal in the bail-bond, who was considered not a party to the record. The Lord Chancellor said the plaintiff's remedy was in equity.^(t)

In the United States Supreme Court it has been said that "Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly whatever may have been the rule at law, such is the rule in equity." * * * The rule in equity is undoubted.^(u) As to the rule in equity where the Statute of Frauds applies, see *infra*.^(v) There can be no question but that on one ground or another modern law has almost abolished the doctrine contained in the maxim "*Eodem modo*."

§ 453. It has been more or less unqualifiedly held that an oral release of a contract under seal is good.^(w) Cases which come also within the Statute of Frauds stand, however, on a differ-

5 Jones, Eq. 294, the court said: "It was also suggested that a verbal declaration of trust cannot be proved without violating the rule of evidence. 'A written instrument shall not be altered, added to, or explained by parol.' The reply is if this position be true, the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration, nor the implication of a trust, has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title *at law*, and is not altered, added to, or explained by the trust, which is an incident attached to it in equity, as affecting the conscience of the party who holds the legal title."

(s) Blake v. White, 1 Y. & Coll. Exch. 425.

(t) Bulteel v. Jarrold, 8 Price, 467.

(u) Canal Co. v. Ray, 101 U. S. 522, and citing certain cases at law.

(v) See Clifford v. Kelly, 7 Ir. Ch. 333; Hoffman v. Lee, 3 Watts, 356; Lefevre v. Lefevre, 4 S. & R. 241; Pope v. O'Hara, 48 N. Y. 452.

(w) Spence v. Healey, 8 Exch. 1; West v. Blakeway, 2 M. & G. 729; Nash v. Armstrong, 10 C. B. N. S. 259; Jervis v. Berridge, 42 L. J. Ch. 518; Davies v. Fitton, 4 Ir. Eq. Rep. 615; Thomason v. Dill, 30 Ala. 444; Miller v. Hemphill, 9 Ark. 489; Levy v. Very, 12 Ark. 145; Smith v. Lewis, 24 Conn. 624; Smith v. Price, 39 Ill. 28; Cooke v. Murphy, 70 Ill. 96; Morrill v. Colehour, 82 Ill. 625; Loach v. Farnum, 8 Cent. L. J. 352 (S. C. Ill.); Shertzer v. Mutual Fire Ins. Co., 6 Rep. 203 (S. C. Md.); Munroe v. Perkins, 9 Pick. 299; Mill Dam Foundry v. Hovey, 21 Pick. 417; Wharton v. Miss. Car Co., 1 Mo. App. 577; Buel v. Miller, 4 N. H. 196; McMurphy v. Garland, 47 N. H. 316; Gary v. Hull,

Oral release
of specialty
held valid.

ent footing.(x) The new contract must have a consideration.(y) An agreement substituted for one required to be in writing must be written, but a change of mode of performance may be oral, as where one apprenticed to a goldsmith's trade was by an oral later agreement with his father, taught special branches more or less to the exclusion of other branches.(z) The equitable rule sustaining the subsequent oral modification of a writing, has been thought to extend to cases at law.(a) In a case in 31st Illinois, the court said,(b) it was an old maxim of the common law, that an obligor could only be released by an instrument of as high dignity as that by which he was bound; being obligated by a seal he could be released only by an instrument under seal. Technically this may be the rule of modern times, but practically, it is not enforced. Of how frequent occurrence is it, that in an action of debt upon a bond or other sealed instrument, the defendant, under a plea of payment, proves by parol the actual receipt by the obligee of the money due on the bond, and which all courts hold to be a release and discharge of the bond. So with a debt secured by a mortgage, a release of such debt need not be under seal.(c) We are not sure but that in every conceivable case where parties are bound to one another by writing under seal, the obligors will be discharged, by parol proof of facts, if sufficient in themselves to constitute a discharge. In all contracts for chattel interests evidenced by sealed instruments, performance *in pais* will generally discharge all the parties to it. So in a lease for rent at a stipulated sum, and guaranteed, as in this case, who will question that parol proof of payment of the sum stipulated will not discharge the guarantors? If proof of payment will discharge him, will not a new parol agreement with the lessee discharge him, especially if that agreement be fully

11 Johns. 441; Lattimore v. Harsen, 14

Johns. 330; Dearborn v. Cross, 7 Cow.

48; Baldwin v. Salter, 8 Paige, 473;

Jenks v. Robertson, 2 Th. & C. 255;

McDonald v. Mountain Lake Co., 4

Cal. 336; Steptoe v. Harvey, 7 Leigh,

501; Shepherd v. Wysong, 3 W. Va.

46.

(z) Swain v. Seamens, 9 Wall. (U. S. 40. S. C.) 271.

(y) Morrill v. Colehour, 82 Ill. 625.

(z) Welshman v. Robertson, 1 Vict. L. R. Law, 129.

(a) Canal Co. v. Ray, 101 U. S. 522, citing Dearborn v. Cross; LeFevre v. LeFevre; and Fleming v. Gilbert.

(b) White v. Walker, 31 Ill. 434.

(c) Citing Ryan v. Dunlap, 17 Ill.

executed? A release under seal is not necessary to discharge a contract under seal.(d) A subsequent unsealed agreement to relinquish a lease under seal is good as a surrender, though not as a defeasance.(e) An instrument with a scroll seal in New Jersey may be rescinded by a subsequent oral agreement.(f) Oral evidence of the acts or declarations of the parties is admissible to show a waiver of the condition of a deed.(g) A power of attorney though under seal may be revoked by parol, and it was held that the usual rule was not applicable to revocation of powers of attorney, especially in this case, where "it was not necessary to enable the plaintiff to execute his agency that his power should be under seal; one by parol or by writing of any kind would have been sufficient; it certainly cannot require more form to revoke the power than to create it."(h) Where a deed was delivered in escrow upon certain conditions, it was held that these conditions while they remained executory may be varied by parol, and such conditions and variation proved by parol evidence. "The execution and delivery of a deed are matters *in pais*, and like all other facts are provable by witnesses. The conditions * * were necessarily mentioned by parol, and while they remained executory were variable by mutual consent, for that which exists in parol may be discharged by parol. *Eodem modo oritur, eodem modo dissolvitur*. And if such contract can be dissolved by parol *a fortiori* it can be varied by parol."(i) Where the defendant by parol, for a valuable consideration, agreed to release the other party to a contract under seal from performance of a part of the work, the contract was held to be valid.(j) In Illinois a lease under seal can be modified by a later distinct agreement though the latter be oral.(k) A new contract upon a new consideration changing a specialty has been held good, as to waive future interest.(l) Delay granted by a simple parol writing to the principal debtor in a bond will discharge a surety.(m) In Massachusetts

(d) *Thomason v. Dill*, 30 Ala. 444. 74; citing *Copeland v. Ins. Co.*, 6 Pick.

(e) *Allen v. Jaquish*, 21 Wend. 628. 198.

(f) *Perrine v. Cheeseman*, 6 Halst.

(i) *Raymond v. Smith*, 5 Conn. 556.

174.

(j) *Jenks v. Robertson*, 2 Th. & Cook

(g) *Leathe v. Bullard*, 8 Gray, 545;

255.

see Co. Litt. 218 a; *Shep. Touch.* 153;

(k) *Danforth v. McIntyre*, 11 Bradw.

2 Cruise Dig. (Greenl. Ed.) Tit. 13 C. 2

420.

§ 25 n.

(l) *Shepherd v. Wysong*, 3 W. Va. 46.

(h) *Brookshire v. Brookshire*, 8 Ired.

(m) *Phillips v. Rounds*, 33 Me. 357.

an obligation of record or under seal may be assigned by an unsealed writing, or by a mere verbal agreement.(n) A sealed building contract may be changed by a subsequent verbal agreement to pay an additional sum for the same work and materials mentioned in the original; a change as to the consideration left the rest of the contract unaffected.(o) A dissolution by parol of partnership articles under seal is good.(p) Apprenticeship has been held to be dissolved when the indentures were given, though not canceled.(q) As to cases within the Statute of Frauds, see § 464.(r) Where an oral rescission is allowed the latter itself may be orally rescinded, and the original specialty be reinstated.(s) Later oral evidence has been admitted also to show a change in the terms of a contract of mortgage. Thus a reduction of the rate of interest.(t) The conditions under which a deed is placed in the hands of a depositary while they remain executory, may be varied by an oral agreement of the parties, and such conditions and variations may be proved by parol.(u) And there is authority, though not uncontested, for allowing oral evidence to show that a mortgage has been enlarged to cover larger amounts.(v) A renewed assignment or continued hypothecation of a mortgage by parol is good, even under the New York R. S. Pt. II. c. 7, pt. 2, which includes things in action. Tit. 2, § 3.(w) An assignment of a bond need not be under seal.(x) An oral waiver by a debtor of a right of notice reserved to him in a mortgage is good.(y) The oral release of a mortgage is valid.(z) While a release not under seal and

(n) *Currier v. Howard*, 14 Gray, 513.

(o) *Cooke v. Murphy*, 70 Ill. 96; see *Munroe v. Perkins*, 9 Pick. 298.

(p) *Wood v. Gault*, 2 Md. Ch. 433.

(q) *Rex v. Titchfield*, Burr. S. C. 511; see however *Rex v. Warden*, 2 M. & R. 24, in which the verbal discharge of articles of indenture was insufficient.

(r) *Hughes v. Wilkinson*, 37 Miss. 486; *Negley v. Jeffers*, 28 Ohio St. 100.

(s) *Flynn v. McKeon*, 6 Duer, 203.

(t) *Milton v. Edgeworth*, 5 Bro. P. C. 313.

(u) *Raymond v. Smith*, 5 Conn. 559.

(v) See as to both views *Bozon v. Williams*, 3 Yo. & Jerv. 150; *Ex p.*

Hooper, 1 Meriv. 7; *Ex p. Coombe*, 17 Ves. Jr. 369; *Ex p. Whitbread*, 1 Rose, 299; *Ex p. Langston*, 17 Ves. 228; *Ex p.*

Lloyd, 1 Gly. Cas. Banking, 391; *Ex p. Kensington*, 2 V. & B. 83; *Stoddard v. Hart*, 23 N. Y. 566.

(w) *Hoyt v. Hoyt*, 8 Bosw. 522.

(z) *Howell v. Bulkley*, 1 N. & McC. 250; see *Howe v. Wilder*, 11 Gray, 267.

(y) *Bourke v. Vanderly*, 22 Tex. 222.

(z) *Wentz v. DeHaven*, 1 S. & R. 317; citing *Martin v. Mowlin*, 2 Burr. 969; *Miller v. Hemphill*, 9 Ark. 489; *Keeler v. Salisbury*, 27 Barb. 485; *Wallis v. Long*, 16 Ala. 738.

without consideration may be void, oral proof of payment of the mortgage is a good defence to an ejectment by the mortgagee.(a) A mortgage lien may be released by parol upon payment to the mortgagee of the debt.(b) When a specialty is changed by parol, the whole contract becomes parol, and the remedy is *assumpsit* and not covenant. See § 474.(c) Even though the only change was an alteration in the time of performance.(d) Thus where a permission is endorsed on a policy, not being in pursuance of any provision of the latter, and not under seal, it is a new and distinct parol written contract and the action is *assumpsit*.(e) It is not every modification, however, which will have this effect; thus a change of the point designated for a road, will not deprive one who has entered into a sealed agreement for grading it from an action of covenant.(f) So a parol agreement by one party to a covenant to waive the performance of a certain part of the covenant by the other party, is not such an alteration of the contract as will render necessary a change in the form of action upon it. Covenant not *assumpsit* was proper. "It imposes no new duty on the defendant; he merely accepts as performance by the plaintiff, that which would not otherwise have been so; and the defendant's liabilities on the original contract remain the same."(g) As to the effect of part performance in making valid an oral modification of a specialty, see § 478.

§ 454. Subject to certain exceptions which will be given hereafter, the general doctrine may be laid down as true that the subsequent oral modification of a written contract under the Statute of Frauds is not valid at law; nor at equity without part performance.(h) Speaking of the admissibility of a subsequent oral agreement to modify or annul a pre-

The rule under the Statute of Frauds—generally.

(a) Jackson d. Roosevelt v. Stackhouse, 1 Cow. 122.

(b) Howard v. Greesham, 27 Ga. 347; see McCorkle v. Brown, 9 Sm. & M. 167.

(c) Vicary v. Moore, 2 Watts, 456; Lehigh Coal Co. v. Harlan, 27 Pa. St. 429; Carrier v. Dilworth, 59 Pa. St. 410; George v. Farr, 46 N. H. 171; Dana v. Hancock, 30 Vt. 619; Briggs v. Vermont C. R. R. Co., 31 Vt. 211.

(d) Id.

(e) Shertzer v. Mut. Fire Ins. Co., 6 Rep. 203 (Md. Ct. of App.)

(f) McGrann v. North Lebanon R. R., 29 Pa. St. 83.

(g) McCombs v. McKennan, 2 W. & S. 216; citing Vicary v. Moore, 2 Watts, 457.

(h) Miller v. Hemphill, 9 Ark. 489; Mitchell v. Universal Life Ins. Co. 54 Ga. 290; Mathison v. Wilson, 87 Ill., 52; Todd v. Allen, 18 Kan. 545; Har-

vious written one, the United States Supreme Court has said : Reported cases may also be found where that rule is promulgated without any qualification, but the better opinion is that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.(i) An alteration by parol of the terms of a written contract under the provision of the Statute of Frauds cannot be binding, for the reason that the alteration creates a new contract which it would be necessary to prove partly by parol evidence.(j) So it has been said that if by the true construction of the contract, his undertaking was a special promise for the debt, default, or misdoings of the railroad company, then perhaps the better opinion is, according to the weight of authority, that a written contract within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.(k) In England it has been said that the result of the cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract entered into in writing, and required so to be by the Statute of Frauds; see § 475.(l) The principle is a general one, and applies to writing required by any law.(m) Thus a stipulation for high interest requiring written proof;(n) so a contract with an officer of the United States Government requiring to be

per *v. Ross*, 10 Allen, 332; *Newton v. Fay*, 10 Allen, 508; *Wilson v. Black*, 104 Mass. 406; *Cook v. Bell*, 18 Mich. 387; *Kimball v. Goodburn*, 32 Mich. 12; *Brown v. Sanborn*, 21 Minn. 402; *Long v. Hartwell*, 5 Vroom, 121; *Huffman v. Hummer*, 3 C. E. Green, 89; *Delacroix v. Bulkley*, 13 Wend. 73; *Coe v. Hobby*, 72 N. Y. 141; see *Cravener v. Bowser*, 4 Pa. St. 262; citing *Goucher v. Martin*; see further in Pennsylvania, *Renshaw v. Gans*, 7 Pa. St. 118; *Garver v. McNulty*, 39 Pa. St. 485; *Espy v. Anderson*, 14 Pa. St. 208; *Bryan v. Hunt*, 4 Sneed, 543; *Williams v. Sewell*, 7 Humph. 551; *Dana v. Hancock*, 30 Vt. 619; *Brown v. Everhard*, 52 Wis. 205.

(i) *Swain v. Seamens*, 9 Wall. (U. S.

S. C.) 272, citing *Clarke v. Russell*, 3 Dall. 415; *Hasbrouck v. Tappen*, 15 Johns. 200; *Blood v. Goodrich*, 9 Wend. 68; *Emerson v. Slater*; *Goss v. Nugent*; *Harvey v. Grabham*; *Stowell v. Robinson*; *Stead v. Dawber*; *Falmouth v. Thomas*; see also *Marshall v. Lynn*.

(j) *Packer v. Stewart*, 34 Vt., 133.

(k) *Emerson v. Slater*, 22 How. 41, citing cases.

(l) *Hickman v. Haynes*, L. R. 10 C. P. 605.

(m) *Deshazo v. Lewis*, 5 St. & Port. 94; *Rigsbee v. Bowler*, 17 Ind., 167, citing *Fry Spec. Perf.* 303; *Rogers v. Atkinson*, 1 Kelly (Ga.) 12, citing cases; *Gardiner v. Bataille*, 5 La. Ann. 597.

(n) *Adler v. Friedman*, 16 Cal. 138.

written under act of Congress, June 2d, 1862; (o) so a contract of insurance in certain States, (p) where there was a submission under seal to arbitration, of the question of the liabilities arising under a sealed lease of a farm with covenants unbroken to pay certain rent and to leave a certain number of acres under rye at a particular date, and the parties agreed to have a verbal award, and the New York Court of Appeals said: That a verbal agreement is a nullity when it is to do only what in this case would at any rate have been required by the arbitrator's award if made; the court citing Caldwell on Arbitra., Am. ed., page 36, n. 1, as follows: "A verbal submission is valid in all cases where the subject matter is such that verbal agreement directly between the parties in the terms of the award would prevail. But where the law, as for instance the Statute of Frauds, requires a contract to be in writing, there both the submission and the award must be in writing;" and where from the subject of arbitration a writing is necessary to pass the right to the thing in demand or to defeat or destroy the demand, the submission and award to be available as a bar to the demand must be in writing. (q)

§ 455. The commonest instances of modified contracts are those relating to the land, and certainly the general rule is that a subsequent oral modification, &c., of a written contract concerning land is invalid under the Statute of Frauds. (r) Even an oral sale, where the vendee takes possession and gives a purchase-money mortgage, cannot be rescinded by parol unless the original vendor shows part performance of the new contract on his part. (s) Thus it has been held that an agreement for the rescission of an executory contract as to land must be in writing. (t) An oral subsequent contract, changing the surveyor who shall survey the land sold by a previous

The rule applied to contracts as to land.

(o) *Jones v. United States*, 11 Ct. of Cl. 740.

(p) *Simonton v. Liverpool Ins. Co.*, 51 Ga. 30; *Mitchell v. Universal &c. Ins. Co.*, 54 Id. 290.

(q) *French v. New*, 23 N. Y. 150, citing *McMullen v. Mayo*, 8 Sm. & M. 298; *Diedrick v. Richley*, 2 Hill, 272; *Russell on Arbitr.*, L. L. 4th Ser. vol. 38, p. 95; *Mayo v. Chiles*, 3 T. B. Mon. 258.

(r) *Espy v. Anderson*, 14 Pa. St. 308; *McDonnell v. Pope*, 9 Hare, 706; *Blood v. Hardy*, 15 Me. 64; *Spencer v. Burton*, 5 Blackf. 57; *Sanderson v. Graves*, L. R. 10 Exch. 236; 44 L. J. Exch. 210; *Goucher v. Martin*, 9 Watts, 106; *Cravener v. Bowser*, 4 Pa. St. 259.

(s) *Kelley v. Stanbery*, 13 Ohio, 408.

(t) *Dial v. Crain*, 10 Tex. 454.

writing, which named another surveyor, is invalid under Statute of Frauds.(u) A contract in writing, whereby the defendant, for a specified price, agrees to sell and convey land, either on demand or in a given time, if accepted by the plaintiff, without writing, and performed on his part, or offered to be, will form the basis of an action, and is not within the Statute of Frauds. But if its terms be enlarged or altered by an oral contract, it is within the statute, the same as if the contract were wholly without writing.(v) A plea of release, on an action to enforce a vendor's lien for purchase-money of land, must be in writing, and for a consideration which must also be set out in the plea.(w) Waiver of part of contract relating to land cannot be made by parol, though the part waived was, taken by itself, not within the Statute of Frauds, the agreement being entire.(x) A parol waiver of a clause of forfeiture in a contract of sale of land, is not good at law.(y) Where an annuity was charged on land, it was held that it could be discharged but by deed or (*semble*) by some formal act. A parol refusal by the grantee is not such an act, and his personal representatives were therefore held entitled to recover arrears.(z) So where there was a bond to

(u) *Dana v. Hancock*, 30 Vt. 619.

(v) *Seward v. Ferris*, 21 Law Reporter, 699 (S. C. Vt.)

(w) *Swan v. Benson*, 31 Ark. 728.

(x) *Harvey v. Grabham*, 5 Ad. & Ell. 73.

(y) *Williamson v. Paxton*, 18 Gratt. 491. In an action of dower *unde nihil habet*, the defendant pleaded that the demandant had, by a parol agreement, accepted and received a sum of money in satisfaction of dower. This was held bad on demurrer. Said the court: "How far a court of equity may decree specific performance, where there has been a parol accord and satisfaction, and part performance, it is not necessary to determine here. The most a court of law can do, is in case of a judgment by default to permit the payments under such an agreement to be given in evidence in mitigation of damages;" *Keeler v. Tatnell*, 3 Zab. 62, citing *Woodruff v. Brown*, 2 Harr. 246.

(z) *Cupit v. Jackson*, 13 Price, 721.

Where a note is given for \$5000 and a deed of trust of land delivered to secure it, and the negotiation is changed, and the loan made for \$3000 instead of \$5000, the trustee cannot sell the land to pay the second note, though under the original deed he had been empowered to do so in the case of the \$5000 note. The majority of the court, the Supreme of Illinois, thought that the Statute of Frauds forbade an exercise of the power of the original deed, as modified by the oral agreement; *Walker v. Carleton*, 97 Ill. 589.

Where, upon a written agreement for land upon the payment of a certain sum of money, and the execution of a mortgage upon the property for the payment of the balance, specific performance will be decreed upon the tender of the money and the mortgage, although an unwritten agreement had been subsequently entered into between

give title and a written agreement of sale, and part of the purchase-money was paid on a sale of land, and there was a new and subsequent oral agreement for the execution of a new bond for the deed on the part of the vendor, and of new notes for the price, of like tenor as the old, except as to time of payment and performance, and the old bond and notes were mutually surrendered; thereupon the vendor refused to carry out the verbal agreement, or to give a bond for a deed, it was held, there being no rescission in fact of the written contract, that the old agreement was in force unaffected by the unexecuted verbal agreement.(a) Oral evidence of a later contract cannot confirm and renew a written agreement as to land, after lapse of time and change of situation.(b) And so an oral agreement to resuscitate a written contract relating to land, which by its terms was to become void upon a certain event which had happened.(c)

§ 456. These cases lead naturally to those to which this principle is also applicable, viz., of those of a resale. It may be enough to say here, though the subject by analogy belongs more to the chapter on Surrender, that an oral rescission of a sale of land is not valid under the Statute of Frauds.(d) A verbal contract to rescind a written one by which land had become vested is within the Statute of Frauds.(e) A writ-

the parties, that a conveyance should be made of a less amount than was called for by the written agreement.

Such an agreement made without any consideration is not binding, and will not prevent specific performance; *Merkle v. Wehrheim*, 32 Ill. 534.

(a) *Mathison v. Wilson*, 87 Ill. 52.

So it has been held that a submission by deed to arbitration of a dispute in regard to land, may be revoked by deed only; *McFarland v. Cushman*, 21 Wis. 404, citing cases. See *supra*.

It has been held that oral conversations, or an understanding as to a boundary, when different from the line as described in a deed, are not to control the latter, for if antecedent thereto, they are merged in the deed; if subsequent, their effect would be to

convey land without a writing; *Clark v. Baird*, 9 N. Y. 203.

(b) *Beall v. Prather*, 1 Harr. & J. 210.

(c) *Davis v. Parrish*, Litt. Sel. Cas. 153.

(d) *Currier v. Howard*, 14 Gray, 513; *Livermore v. Eddy's Admr.*, 33 Mo. 547; *Hasbrouck v. Tappen*, 15 Johns. 200; *Gratz v. Gratz*, 4 Rawle, 434; *Murphy v. Hubert*, 7 Pa. St. 420; *Meason v. Kaine*, 63 Pa. St. 335; *Maxwell v. Wallace*, 1 Busb. Eq. Rp. 251; *Dial v. Crain*, 10 Tex. 454; *Bullion v. Campbell*, 27 Tex. 656; see *Lovell v. Smith*, 3 C. B. N. S. 125; *Buckhouse v. Crossby*, 2 Eq. Ca. Ab. 32, pl. 44; *Goman v. Salisbury*, 1 Vern. 240; see "Surrender."

(e) *McCulloch v. Tapp*, 4 West. L. Monthly, 575, Logan Co. C. P. Ohio.

ten contract for the sale of land cannot be surrendered by parol.(f) Where a vendee is in possession of land under a written contract of sale, having in part paid therefor, it was held that the vendor could not recover it back in ejectment, upon proving a parol contract to resell it on different terms, and an entry of satisfaction of a judgment against the vendee in part payment to him of such resale; that this was not a case of the discharge of a written contract by parol, but was a resale.(g) So in Pennsylvania it has been decided that possession delivered and long enjoyed under a sealed agreement amounted to an actual demise of land, and created a title which cannot be rescinded by parol; though if the agreement had been executory, the rule might have been otherwise.(h) A reconveyance by a vendee to a vendor, the former being unable to pay the first installment of the purchase-money, is not affected by a parol agreement that upon a payment of such installment, the vendor should reconvey to the vendee; such an agreement is for a resale, and is within the Statute of Frauds.(i) Where, after the execution of a written contract for the sale of land, the vendor and vendee agreed verbally to cancel agreement of sale, the vendor to return amount paid plus a bonus of \$102, and the vendee gave up possession and the vendor sold to another; in an action to recover \$102, it was proved that the vendor had acknowledged he was to pay this sum, but the plaintiff was nonsuited for want of a writing, it was held if the acknowledgment was made after the cancellation of the agreement and resale to the third party, the plaintiff might recover upon a count as for an account stated, and this not being clear from the evidence, a new trial was awarded.(j) Speaking of a certain deed which had been proved in a case before them, the Supreme Court of New Hampshire said, "if that deed be received it shows the title to have passed from the demandant, and once proved to have passed, the better opinion seems to be, that no subsequent alteration or canceling of the conveyance would revest the title; the phraseology also of the first section of our statute

(f) *Jeune v. Osgood*, 57 Ill. 340.(h) *Garver v. McNulty*, 39 Pa. St. 485.(g) *Goucher v. Martin*, 9 Watts, 107; see however as to personalty, *infra*; see as to the difference between a rescission and a resale, *Gleason v. Drew*, 9 Greenl. 79; see *Cravener v. Bowser*, 4 Pa. St. 262.(i) *Thompson v. Elliott*, 28 Ind. 55.(j) *Gross v. Bricker*, 18 U. C. Q. B. 410, relying upon *Cocking v. Ward*, 1 C. B. 858.

'declaring the mode of conveyance by deed' countenances this doctrine, and so too does the approved maxim '*Ut iisdem modis dissolvantur quibus constituentur.*' 1 Cruise, 411."(k)

§ 457. The rule requiring a writing to evidence the subsequent modifications of a written contract within the statute has been applied to the case of chattels also.(l) An assignment of goods was held in a case in Levinz not to be divested by cancellation of the assignment.(m) A valid executory contract for the sale and delivery of a certain quantity of merchandise cannot, under the Statute of Frauds, be altered by a parol agreement increasing the quantity to be delivered, and so engraft the latter stipulation upon the original contract.(n) In Louisiana the parol rescission of a sale of slaves was inadmissible.(o) Where there was a sale of fifty tons of hemp by bought and sold notes, the defendant offered two orders of "about" twenty and thirty tons each, and alleged an oral alteration of the original contract; this was held to be invalid.(p) A sale made by the vendor, giving the vendee a bill of parcels and a certificate that he held the goods on storage for the vendee, and by the vendee giving the vendor a promissory note for the price, was not rescinded under the Statute of Frauds, by the vendee agreeing by parol to reconvey the goods upon the redelivery of the note.(q) A written contract signed by the defendant to buy the flax straw to be raised from forty-five bushels of flax seed, "the straw to be delivered in a dry condition free from weeds, &c.," shows a con-

Rule applied to chattels.

(k) Chesley v. Frost, 1 N. H. 147. In Pettis v. Ray, 12 R. I. 344, a payee of notes secured by a mortgage having made, as alleged, a parol agreement with his debtor to accept another in his place, and discharge him, sold the realty under a power of sale on the mortgage, and brought suit after buying in the premises himself to recover balance still due on the notes, it was held the defence was bad as attempt in violation of the Statute of Frauds to substitute an oral contract for the written contract evidenced by the auctioneer's memorandum of sale.

(l) Stead v. Dawber, 10 Ad. & Ell. 57; Marshall v. Lynn, 6 M. & W. 109; Pack-

er v. Stewart, 34 Vt. 130; see Moore v. Campbell, 23 L. J. Exch. 310; Tyers v. Rosedale & Co., L. R. 8 Exch. 315.

(m) Nelthorpe v. Dorrington, 2 Lev. 113.

(n) Schultz v. Bradley, 57 N. Y. 646; 4 Daly, 29.

(o) Emmerling v. Beebe, 15 La. Rep. 251.

(p) Moore v. Campbell, 23 L. J. Ex. 310.

(q) Chapman v. Searle, 3 Pick. 46; where, however, the contract has been fully performed, the rule may be otherwise; see Norton v. Simonds, 124 Mass. 19.

tract for sale and not for labor, and the plaintiff, therefore, cannot recover on a subsequent parol modification of the contract by which the stipulation as to freedom from weeds was to be omitted.(r) The general question was referred to in a New York case, but was not decided.(s) And in another case, while admitting the exception to be considered hereafter of the time and manner of payment, the Court of Appeals held that a resale of chattels by the buyer to the seller is not valid by parol, there being no redelivery.(t) The same rule is applied to contracts not to be performed within a year, and Chief Justice Tindal, speaking of such a case, said: It is a contract within the Statute of Frauds. Their agreement was to be paid at end of a year. The question, therefore, is whether an alleged defect in the contract cannot be supplied by parol evidence. That would be a direct violation of the statute. Nor can the subsequent acts of the parties change it.(u)

§ 458. Before taking up the more or less well-established exceptions to the rule that a written contract within the statute can be modified or discharged only by writing, it will be well to consider those decisions which either really or apparently deny that principle.

In Massachusetts it has been held broadly that a written contract within the Statute of Frauds may be varied or altered by a subsequent parol agreement and that the entire contract as altered will be enforced notwithstanding the statute. The court seem to have thought that, the contract once having been put into writing, the spirit of the Statute of Frauds was sufficiently followed by limiting the parol proof to vary the writing to such as would at common law be admissible to affect a writing, and the court said that Parke, J., in *Goss v. Lord Nugent*, thought that under the rule of *Cuff v. Penn* the plaintiff would have to prove his contract partly by writing and partly by parol; but, said the court in the principal case, the plaintiff will declare on the writing and the defendant will be obliged to show the nature of his performance.(w)

(r) *Brown v. Sanborn*, 21 Minn. 402.

(s) *Organ v. Stewart*, 1 Hun, 411.

(t) *Blanchard v. Trim*, 38 N. Y. 228.

(u) *Giraud v. Richmond*, 2 M. G. & S. 835, citing *Goss v. Nugent*.

(w) *Cummings v. Arnold*, 3 Metc.

489, holding *Stowell v. Robinson* to overlook the distinction that the subsequent performance of a contract is not affected by the Statute of Frauds, however much the original evidence of the contract itself is.

The Massachusetts doctrine has been noted with apparent disapproval by the Supreme Court of the United States.(x) The rule of *Cummings v. Arnold* has been followed in New Hampshire.(y) In Florida, the Supreme Court, observing that the endorsement of a note is not a collateral undertaking for the debt of another within the meaning of the Statute of Frauds, but is a new contract between endorser and endorsee, held where the endorser of a note promised to pay at maturity out of his own funds, and the endorsee, in consideration thereof, agreed to receive payment in notes of the Southern Life Insurance Company which were depreciated, that this was a substituted agreement on a valuable consideration, not within the Statute of Frauds.(z) Where the statute does not apply there may be no reason for requiring the later contract to be in writing (see § 440); and it is often expressly noted that the rule that an oral change or release of a written contract applies only to those which no law requires to be put into writing.(a) An insurance contract may be so varied,(b) and if the Statute of Frauds does not apply, the later contract is valid though oral.(c) If the original contract is taken out of the Statute of Frauds as a sale of chattels, followed by a part delivery and acceptance of an earnest, it has been said that the new agreement changing the old is valid though oral, because, as the payment of earnest, &c., would allow the original contract to be proved by parol, there is no reason why the later modification should not be also established in the same way.(d) Where the declaration stated that the defendant guaranteed the plaintiff in supplying goods to H., and there was a plea that before breach the plaintiff and the defendant agreed that the plaintiff should take a note, and this was accepted in discharge of the

(x) *Emerson v. Slater*, 22 How. (U. S. S. C.) 41.

(y) *Buel v. Miller*, 4 N. H. 196, a case, however, coming within the exception of "Defence." See § 481.

(z) *Spann v. Baltzell*, 1 Flor. 313, citing cases.

(a) *Deshazo v. Lewis*, 5 Stew. & Port. 94. *Rigsbee v. Bowler*, 17 Ind. 167, citing *Fry*, Spec. Perf. 303; *Rogers v. Atkinson*, 1 Kelly (Ga.) 12, citing cases; *Gardiner v. Bataille*, 5 La. Ann. 597.

(b) *West Chester v. Earle*, 33 Mich. 153; but *secus* if a written policy was required; *Mitchell v. Univer. Life Ins. Co.*, 54 Ga. 290.

(c) *Swain v. Seamens*, 9 Wall. (U. S. S. C.) 271; *Piatt's Admr. v. United States*, 22 id. 506; *Emerson v. Slater*, 22 How. 41; *Hogan v. Crawford*, 31 Tex. 635; *Brown v. Everhard*, 52 Wis. 205; *Hewitt v. Brown*, 21 Minn. 165; *Roger Williams Ins. Co. v. Carrington*, 43 Mich., 252.

(d) *Packer v. Stewart*, 34 Vt., 130.

guaranty; it was held on demurrer that the second agreement was an original undertaking, and did not require to be in writing under the Statute of Frauds; that it was not an accord and satisfaction, and that it was a good defence as a substituted agreement.(e)

§ 459. Even in regard to contracts relating to land the strict doctrine has not always been adhered to. Thus a condition in a written contract within the Statute of Frauds and relating to land, when for the benefit of the party to be charged, may be orally waived by him.(f) The substitution by parol of other valuers of the land secured in the writing, is not invalid if it does not alter the right of the parties.(g) An oral waiver of certain stipulations of a land contract is good in equity when a stipulation in writing for an unincumbered title was waived by parol, and it was through the plaintiff's neglect that the incumbrances remain.(h) Where there has been a written release to a railroad to build a road and subsequently a parol ratification, to explain an ambiguity in the writing the landowner will not be permitted to retract the oral modification.(i) Though, as has been already seen, it has been decided that a contract within the Statute of Frauds, which is to come to an end upon a contingency, and which contingency has happened, cannot be revived by parol. See *supra*. Yet it has been decided that a contract which within a certain time can be fulfilled by a conveyance of land or a payment in money, may be extended as to this alteration by an oral agreement, the time not being of the essence of the contract. See §472.(j)

Where a plaintiff by writing granted privileges in land to the defendant, who was to repair a dam thereon, and it was afterwards agreed by parol that the plaintiff was instead to build a new dam, the defendant to pay one-half the cost, it was held that the Statute of Frauds did not apply.(k) But in this as in the following cases, as the

(e) *Taylor v. Hilary*, 1 Cr. M. & R. 741.

(i) *Lexington R. R. Co. v. Ormsby*, 7 Dana, 280.

(f) *Blood v. Hardy*, 15 Me. 64, citing cases.

(j) *Kimball v. Goodburn*, 32 Mich. 12.

(g) *Stark v. Wilson*, 3 Bibb, 476.

(k) *Jackson v. Litch*, 62 Pa. St. 451;

(h) *Devling v. Little*, 26 Pa. St. 502; it has been held (*semble* under the Dutch law) that an auctioneer can orally waive certain conditions of sale and thereby relieve the purchaser; *Buykes v. Holl*, 2 Menz. (C. G. Hope) 24.

there was moreover part performance in this case, see § 478; and see *Lefevre v. Lefevre*, 4 S. & R. 241. It has been held in Pennsylvania that an equity under written articles may be released by parol; *Dayton v. Newman*, 19 Pa. St. 198, citing cases.

right in question was regarded as not one coming within the statute, the admission of the later oral contract was no violation of the general rule that a written contract relating to a subject within the purview of the Statute of Frauds, cannot be changed by a subsequent oral agreement. Where there was a submission (by deed) to arbitration containing no power to enlarge the time for making the award, parties by parol agreed to enlarge the time: It was held, that it was not a contract about an interest in land, &c., but only about damages sustained by the plaintiff in consequence of a road being cut through his land; the award might be considered as having been made upon a new parol submission.^(l) Oral evidence is admissible of the continuance of a partnership upon the terms in the original agreement of partnership, the real estate owned by the firm being treated as personalty.^(m)

In North Carolina, it has been held that an executed but unregistered deed of land passes not the legal but only the equitable estate, and therefore, before registration the parties may rescind the contract by re-exchanging the consideration and the deed, but where the agreement in such cases is by parol it cannot be invalidated by one who is not a party to it. He cannot avail himself of the Statute of Frauds.⁽ⁿ⁾ A written lease not under seal for one year can be changed by a later oral contract upon a new consideration.^(o) Where the vendee has taken a deed of land wherein it is agreed that the purchase-money is not to be paid until certain incumbrances on the land are removed, a subsequent parol agreement is good, having a consideration by which the vendee agrees to pay the money absolutely, and waives the stipulation as to the incumbrances; because the deed having been executed the contract relates merely to the money.^(p) A parol agreement as to a division line may be modified by a subsequent oral agreement; as to the^(q) law of boundaries, see "Land."

§ 460. There are a few cases of the subsequent oral modification of a written contract relating to chattels being held good notwithstanding the Statute of Frauds. Thus a parol agreement of indemnity by the seller against the

Applied to
chattels.

(l) *Gillanders v. Lord Rossmore*, 1 Jones, Ir. Exch. 504.

(o) *Flanders v. Fay*, 40 Vt. 316.

(m) *Essex v. Essex*, 20 Beav. 449.

(p) *Negley v. Jeffers*, 28 Ohio St. 100.

(q) *Jackson (d. Nellis) v. Dyeling*, 2

(n) *Davis v. Inscow*, 84 No. Car. 400. Cal. (N. Y.) 198.

claim of a third party, made subsequently to a written agreement of sale of goods, is valid; but here the seller's promise was only to do what the law at any rate required of him.^(r) The renewed assignment or continued hypothecation of a mortgage is good even under the New York Statute of Frauds, which includes things in action;^(s) a lien on lumber reserved in a conditional deed to secure the purchase price of land on which the lumber was cut, may, it has been held, be waived by parol.^(t) It has been said a subsequent oral waiver is good only as to personalty and in equity.^(u)

§ 461. A distinction very generally prevails between a mere change in a written contract by a subsequent oral one and an entire rescission made in like manner, the latter being held good where the former would not be, and the reason of this is because in the latter case the person setting up the oral contract asks for nothing except to be let alone.

Whereas where a mere modification is alleged the person alleging asks for performance of the modified contract, as opposed to the contract set out in the writing. As will be seen presently, an oral change in the contract when used merely for the purpose of defence, will be listened to with more consideration than would otherwise be accorded it; and in another chapter the quasi validity of oral agreements when used for this purpose is pointed out.

It may be said generally that an oral rescission of a written contract within the Statute of Frauds is good.^(v)

(r) *Brewster v. Countryman*, 12 Wend. 446.

(s) *Hoyt v. Hoyt*, 8 Bosw. 522.

(t) *Stone v. Fairbanks*, 53 Vt. 145.

(u) *Goucher v. Martin*, 9 Watts, 109.

(v) *Price v. Dyer*, 17 Ves. 363; *Clifford v. Kelly*, 7 Ir. Ch. 333; *Wilkins v. Duncan*, 2 Litt. 168; *Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *McGrann v. North Lebanon R. R. Co.*, 29 Pa. St. 82; *Wentz v. De Haven*, 1 S. & R. 317; *Lefevre v. Lefevre*, 4 S. & R. 241; *Goucher v. Martin*, 9 W. 109; *Boyce v. McCullough*, 3 W. & S. 429; *Shoofstall v. Adams*, 2 Grant (Pa.), 213; *Cravener v. Bowser*, 4 Pa. St. 259; *Renshaw v. Gans*,

7 id. 118; *Espy v. Anderson*, 14 Pa. St. 308; *Dayton v. Newman*, 19 Pa. St. 194; *Kline's App.*, 39 Pa. St. 468; *Lauer v. Lee*, 42 Pa. St. 170; *Bowser v. Cravener*, 56 id. 132; *Jackson v. Litch*, 32 id. 451. See also *Raffensberger v. Cullison*, 28 Pa. St. 439; *Cummings v. Arnold*, 3 Metc. 486 (citing English cases); *Leathe v. Bullard*, 8 Gray, 545. As to rescission generally see *Cook v. Doggett*, 2 Allen, 439; *Dyer v. Graves*, 37 Vt. 369; *Dodgen v. Camp*, 47 Ga. 328; *Rex v. Fitchfield*, Burr, S. C. 511. And as to how far the performance of a contract can be discharged by parol, see *Millward v. Ingram*, 2 Mod. 44; 1 id. 205; 1 Freem. 95.

Thus it has been said that a subsequent oral contract clearly proved shows a total discharge of a writing within the Statute of Frauds; the proof is good as a defence.(w) It is said, however, that on the general point there is conflict of authority.(x) And even an agreement to rescind an executory contract has been held invalid if it relates to land.(y) It has been held that a submission under seal to arbitration in a matter relating to lands may be revoked by deed only. See on this subject *supra*.(z) In an early case in England, which is perhaps no longer authority, it was held that an agreement in writing may be discharged by parol even since the Statute of Frauds.(a) It has been held that a contract put into writing, as required by the Statute of Frauds, may be waived or discharged as to payment thereunder by a subsequent parol contract founded on a new consideration.(b) And the rule has been applied to contracts relating to land.(c) Where a stipulated time is given in a deed in which to rescind, the fact of such rescission may be proved by parol; that is, the rescission may be by an act *in pais* or by word of mouth.(d) In Pennsylvania it has been said that, while equitable interests in land are within the Statute of Frauds and are not assignable except by writing, they may be waived by parol so as to put it out of the power of the holder to obtain the interposition of a chancellor on his behalf, or they may be released.(e) An equitable title may be surrendered by parol, though it cannot be created in that manner.(f) A waiver of jointure *in pais* is good, because the jointure being created by a use may be waived by parol.(g)

(w) Robinson v. Page, 3 Russ. 119.

(x) Long v. Hartwell, 5 Vroom, 121.

(y) Dial v. Crain, 10 Tex. 454.

(z) McFarlane v. Cushman, 21 Wis. 404; see § 466.

(a) Goman v. Salisbury, 1 Vern. 240; see Romilly's argument in Price v. Dyer, 17 Ves., in which it was said that Goman v. Salisbury was not in the register's book. Goman v. Salisbury was explained in Goucher v. Martin, 9 Watts, 107, as a mere agreement to sell not partly performed; if it had been partly performed it could not have been discharged by parol; Goman v. Salisbury was doubted in 2 Eq. Ca. Ab. 26.

(b) Negley v. Jeffers, 28 Ohio St. 106, citing Cummings v. Arnold, 3 Metc. (Mass.) 489; Stearns v. Hull, 9 Cushing, 31; Bever v. Butler, Wright, 367; Reed v. McGrew, 5 Ohio, 375; Bethel v. Woodworth, 11 Ohio St. 393.

(c) Baldwin v. Salter, 8 Paige, 473; Guthrie v. Thompson, 1 Or. 353.

(d) Hughes v. Wilkinson, 37 Miss. 486.

(e) Kline's Appeal, 39 Pa. St. 468, citing cases.

(f) Shoofstall v. Adams, 2 Grant Cas. (Pa.) 213.

(g) Butler v. Baker, 22 Vin. Abr. 529; Moo. 254.

Written articles of agreement for the purchase or sale of land may be waived by parol, and a vendee who has paid no part of the purchase-money, and has canceled with the consent of the vendor the articles of agreement, possesses no title to the land.^(h) Where vendees occupied land for the prescriptive period under an oral sale, but had not paid the purchase price, an oral abandonment of the sale was valid as a surrender.⁽ⁱ⁾ Where the complainant voluntarily abandoned the agreement when he found that he could not complete it on his part, it is doubtful at least whether any court of equity will allow him to set it up again, for the purpose of claiming specific performance thereof, after the whole object of the defendant in entering into the original agreement has been defeated.^(j)

It has been said that it is only an executory contract as to land which can be rescinded by parol.^(k) So an executory discharge of an executory agreement under seal relating to land;^(l) and it has been said that where the original agreement has been partly performed, the oral rescission is invalid;^(m) where the interest is not one within the Statute of Frauds, the waiver may well be by parol. Thus a statutory complaint for flowage is but a mere pecuniary claim, and can therefore be waived, satisfied, or extinguished by parol.⁽ⁿ⁾ A written rescission of a written sale of land is of course

(h) *Raffensberger v. Cullison*, 28 Pa. St. 439, citing *Stevens v. Cooper*, 1 Johns. Ch. 429.

(i) *Adams v. Fullam*, 43 Vt. 592.

(j) *Baldwin v. Salter*, 8 Paige, 473. Where the plaintiff and defendant entered into a written contract for purchase of land, no time being specified for the completion of the sale, but the defendant to make a title on the plaintiff paying the purchase-money. After a time the defendant having offered to make a conveyance, the plaintiff requested more time to obtain the money, and was given a year. At the end of the year the defendant offered again to convey, though tendering no deed, and the plaintiff finally left the premises and the defendant entered. The plaintiff having brought trespass, it was held that the defendant's offer and plaintiff's ex-

pressed inability to fulfill the contract exonerated him, the defendant, from a second tender, and left it in his power either to adhere to and enforce the agreement by action, or to rescind it in consequence of the plaintiff's default. *Mulgrew v. Pringle*, Draper, U. C. 282.

(k) *Lauer v. Lee*, 42 Pa. St. 170; *Garver v. McNulty*, 39 Pa. St. 485; see *Negley v. Jeffers*, 28 Ohio St. 100; *Long v. Hartwell*, 5 Vroom, 121 (citing cases).

(l) *Smith v. Lewis*, 24 Conn. 624.

(m) *Goucher v. Martin*, 9 Watts, 109, distinguishing *Goman v. Salisbury*; see *Kelley v. Stanbery*, 13 Ohio, 408; see *Cravener v. Bowser*, 4 Pa. St. 262.

(n) *Quinn v. Besse*, 64 Me. 366, citing *Snow v. Moses*, 53 Me. 547; *Hersey v. Packard*, 56 id. 395.

good.(o) The evidence of a rescission of a contract relating to land must, it has been held, be of acts which leave no doubt of the intent,(p) and the evidence must certainly be clear.(q)

Waiver of a contract (for sale of real estate) may be by parol, but it should be express, and of such a character as to leave no reasonable doubt as to the intention of the parties.(r)

Where a partner sold and delivered goods to his firm which soon after dissolved, when it was agreed by parol that the partner should take back his goods; it was held that this was a mere rescission and not a resale requiring a memorandum.(s) Where there was a sale of fifty tons of hemp by bought and sold notes; the defendant offered two orders of (about) twenty and thirty pounds each, and alleged an alteration of the original contract by parol. It is void, but *semble*, if it had been an entire discharge it would have been valid, but an oral contract within the Statute of Frauds cannot be substituted by parol.(t) A release of a chattel mortgage by a subsequent parol contract is good.(u)

Where an absolute bill of sale of chattels is shown by parol to be as security, it loses all its validity upon proof of payment of the debt to secure which it was given.(v)

Where the Statute of Frauds did not apply to the original transaction, the later contract, as has been already said, is valid. Thus where the plaintiff by writing sold goods to C. H., an infant, and sent them to the defendant, to be prepared for C. H., and afterwards the plaintiff and C. H. went to see the defendant and requested him to send the goods back, and he the defendant said he would return them or pay for them, it was held that the seventeenth section of the Statute of Frauds did not apply to the new verbal contract, and the verbal rescission of the sale from the plaintiff to C. H. was valid; delivery and acceptance having (*semble*)

(o) *Parmley v. Buckley*, 103 Ill. 115. the evidence offered was held insufficient.

(p) *Lauer v. Lee*, 42 Pa. St. 170.

(s) *Dickinson v. Dickinson*, 29 Conn.

(q) *Clifford v. Kelly*, 7 Ir. Ch. 333;

602. As to the difference between a res-

McCorkle v. Brown, 9 S. & M. 167, citing

cission and a resale, see *Gleason v. Drew*,

Price v. Dyer, 17 Ves. 356; *Smith v.*

9 Greenl. 79.

Garth, 32 Ala. 368; *McGrann v. North*

(t) *Moore v. Campbell*, 23 L. J. Exch.,

Lebanon Railroad, 29 Pa. St. 82; *Falls*

310.

v. Carpenter, 1 Dev. & Bat. Eq. 237;

(u) *Acker v. Bender*, 33 Ala. 230.

Farr v. Whittington, 72 N. Car. 321.

(v) *Nillar v. Northman*, 9 Chic. Leg.

(r) *Rodman v. Tilley*, Saxt. 320, where

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taken the first contract out of the (w) Statute of Frauds. So where there was invalid oral promise to pay for the services of the plaintiff's son, which services were partly rendered, and there was a new agreement that if the son would enlist, to pay the plaintiff the sum fixed in the original contract, the Statute of Frauds is no bar; there having been (*semble*) sufficient(x) part performance. Where the new contract is inoperative of itself it will not rescind the previous writing, though if it had been operative the effect would have been to rescind;(y) but *semble* that a jury might find in an invalid contract an intention to rescind, though the court could not.(z)

§ 462. In one not unimportant particular the general weight of authority favors the proof of a subsequent oral contract to modify a previous written one, when, namely, the effect of the later is merely to extend the time within which the previous contract is to be performed; and this whether the subject-matter of the agreement is or is not affected by the Statute of Frauds.(a) It has been held in England, though, as will be seen, this exception is not now upheld, that where an agreement in writing was to be performed on a certain day, and the parties agree to enlarge the time; and the declaration gave the day as stated in the agreement, evidence of the day as afterwards agreed upon will support the declaration.(b) Where the original contract is in writing, as required by the statute, it may be varied as to the time of payment, or wholly waived or discharged as to

(w) *Douglas v. Watson*, 17 C. B. 695.

(z) *Jones v. Hay*, 52 Barb. 501.

(y) *Noble v. Ward*, L. R. 1 Exch. 121.

(z) *Id.*

(a) *Cuff v. Penn*, 1 M. & S. 21 (now overruled by *Stead v. Dawber*); *Waugenheim v. Graham*, 39 Cal. 169; *Cooke v. Murphy*, 70 Ill. 96; *Perry v. Cent. South R. R. Co.*, 5 Cold. 138; *Wittmer v. Ellison*, 72 Ill. 301; *Ockington v. Law*, 66 Me. 551; *Stearns v. Hall*, 9 and *Cush*, 31; citing *Cummings v. Arnold*; and *Cuff v. Penn*; *Flagg v. Dryden*, 7 Pick. 54; *McEwan v. Ortman*, 34 Mich. 327; *Keating v. Price*, 1 Johns. Cas. 22; *Fleming v. Gilbert*, 3 Johns. 528; *Er-*

win v. Sanders, 1 Cow. 250; *Organ v. Stewart*, 1 Hun, 411; *Stone v. Sprague*, 20 Barb. 515; *New York State Loan Co. v. Helmer*, 5 N. Y. Wkly. Dig. 197; *Dodge v. Crandall*, 30 N. Y. 294; *Loomis v. Donovan*, 17 Ind. 198; *Sherwin v. Rutland R. R. Co.*, 24 Vt. 347; *Packer v. Steward*, 34 Vt. 130.

(b) *Thresh v. Rake*, 1 Esp. 53; see *Warren v. Stagg*, cited in *Littler v. Holland* (was a sale of chattels); but see *Littler v. Holland*, 3 T. R. 591; *semble* overruled by *Thresh v. Rake* (Lord Kenyon giving the opinion in both cases).

such payment by a subsequent parol contract founded on a new consideration. A covenant to procure the discharge from the record of a mortgage or the time of performance of a written contract within the statute, may be enlarged as to time of performance by a verbal contract.(c) If at the moment for performance of a contract by one party, both agree to a postponement, the parties "carry the yet unbroken contract into a new one, and neither has a just claim for damages."(d) A subsequent parol agreement not contradicting the terms of the original contract, but merely in continuance thereof, and in dispensation of the performance of its terms, as in prolongation of the time of execution, is good, even in the case of a contract reduced to writing under the Statute of Frauds.(e) Such a contract upon a good consideration is good; it is only a waiver of strict performance.(f)

Where within a certain time a payment could be made either in land or money, time is not in equity essential as to either, and where there has been part performance, as by accepting the money, there can be no objection grounded on the Statute of Frauds,(g) and even where time is of the essence it may be waived by parol.(h) A parol agreement to postpone delivery of an article under a contract without seal is not a waiver of the contract, but only an enlargement of the time for its performance, and is a continuance of the original contract.(i).

One who agrees verbally to extend the time for the performance of a written contract, and thereby puts the other party off his guard, will be estopped from taking advantage of the non-performance at the time first agreed upon, and the other party will have the extended time in which to perform.(j) Where the time

(c) *Negley v. Jeffers*, 28 Ohio St. 100, citing *Cummings v. Arnold*, 3 Metc. 489; *Stearns v. Hall*, 9 Cush. 31; *Bever v. Butler*, Wright, 367; *Reed v. McGrew*, 5 Ohio, 376; *Bethel v. Woodworth*, 11 Ohio St. 393, and other cases.

(d) *McNish v. Reynolds*, 95 Pa. St. 483.

(e) *Low v. Treadwell*, 12 Me. 444, citing *Thresh v. Rake*, 1 Esp. 53; *Ratcliffe v. Pemberton*, 1 Esp. 35; *Erwin v. Sanders*, 1 Cow. 250.

(f) *Wilgus v. Whitehead*, 6 W. N. Cas.

537, 8 Norris, 131; (a case not within the Statute of Frauds); citing *Munroe v. Perkins*, 9 Pick. 298, and other cases; *Stone v. Sprague*, 20 Barb. 515.

(g) *Kimball v. Goodburn*, 32 Mich. 12.

(h) *Melton v. Smith*, 65 Mo. 315; *Reed v. Chambers*, 6 G. & J. 490.

(i) *Watkins v. Hodges*, 6 H. & J. 38, citing following: *Warren v. Stagg*, cited in 3 T. R. 591; *Keating v. Price*, 1 Johns. Ca. 22; *Cuff v. Penn*, 1 M. & S. 21; see *Coates v. Sangston*, 5 Md. 121.

(j) *Longfellow v. Moore*, 102 Ill. 239.

is extended and the contract then fulfilled, it cannot be contended that, the agreement being void, the original contract alone is to determine.^(k) Parol evidence is admissible to show that the time mentioned in a written contract for the delivery of goods sold was subsequently enlarged; and therefore, where no time was fixed by the written agreement, evidence was received to show that it was afterwards fixed by parol.^(l) It has been held in New York that a new agreement enlarging the time of performance need not have a consideration.^(m)

It has been suggested that the place of performance even of a covenant may be changed by a subsequent oral contract.⁽ⁿ⁾

§ 463. This present exception has been applied in a variety of instances. To contracts, for example, relating to land.^(o)

Examples. In the case of a sale of standing timber, an extension of the time to cut is good as a license if acted upon.^(p) To a sale of chattels,^(q) where in a promissory note the creditor orally gives the principal debtor time, a surety is discharged.^(r) An agreement by parol extending the payment of a note is good.^(s) In Lower Canada the time of payment of a promissory note, though above \$50, may be extended by parol.^(t) A subsequent enlargement by a new and distinct contract of the time of payment of a promissory note given for a patent right is valid, though oral.^(u) There is authority for holding that not merely the time, but also the manner of performance may be modified by parol.^(v) Thus the place of performance may in New Hampshire be so changed,^(w) and even a new arrangement as to the appointment of an agent to receive the money to come

(k) *Botts v. Cozine*, 1 Hoff. Ch. Rep. 79.

(l) *Neil v. Cheves*, 1 Bail. Law, 537, citing *Pickett v. Cloud*, 1 Bailey Law, 362; *Sharp v. Lipsey*, 2 Bailey Law, 113; see *Chambers v. Board of Education*, 60 Mo. 379; *Coates v. Sangston*, 5 Md. 121.

(m) *Clark v. Dales*, 20 Barb. 42; see *Burt v. Saxton*, 4 Th. & C. 109; 1 Hun, 551.

(n) *McMurphy v. Garland*, 47 N. H. 316.

(o) *Ewing v. Gordon*, 49 N. H. 458; *Kimball v. Goodbourn*, 32 Mich. 12.

(p) *Haskell v. Ayres*, 35 Mich. 89.

(q) *Chiles v. Jones*, 3 B. Mon. 51; there had, however, been no tender according to the terms of the contract; *Kelleran v. Brown*, 4 Mass. 443.

(r) *Buck v. Smiley*, 64 Ind. 431; *Wittmer v. Ellison*, 72 Ill. 301; *McComb v. Kittridge*, 14 Ohio, 352.

(s) *Ferguson v. Hill*, 3 Stew. 485.

(t) *Eastman v. Rolland*, 2 Low. Can. L. Jour. 216 (C. C. Browne Co.).

(u) *Ockington v. Law*, 66 Me. 551.

(v) *Blanchard v. Trim*, 38 N. Y. (11 Tiff.) 228.

(w) *Robinson v. Batchelder*, 4 N. H. 45.

from a sale of chattels,^(x) and in England, somewhat inconsistently with the present law there, a change being allowed of route by which goods were to be shipped, the ground taken was that the substituted mode of performance was actually carried out with the assent of the other party.^(y) The evidence of a subsequent oral change may be offered by either plaintiff or defendant.^(z) It has been held that where the time of performance of a contract within the Statute of Frauds has been extended by parol, the plaintiffs should declare on the written contract, and if the defendants had not complied with the terms of the contract as extended, the parol modification would not avail them as a defence.^(a)

A declaration averring that the time of performance of a contract (*semble* written) was enlarged is not demurrable, because it does not state the latter to have been in writing, and therefore necessitating proof from the plaintiff that there was consideration.^(b) An oral extension of the time of performance of a written contract is admissible, under the general issue.^(c)

§ 464. The time of performance of even a specialty may be extended by a later oral contract.^(d) This rule is applied to mortgages, which, however, give a mere lien for a debt rather than any interest in land.^(e) It is certainly the rule in equity, especially where a third person has taken the land in reliance upon the promise.^(f) It is a good defence where, in consideration thereof, the mortgagor gave an additional mortgage.^(g) In a New York case, where the principal of a mortgage became due after default in payment of interest, the defence in a foreclosure that the parties agreed by parol to extend time of payment of the installment of interest for twenty days, which was then to be paid at the mortgagor's house, and that he was ready to pay

(z) *Cummings v. Putnam*, 19 N. H. 528; *Flynn v. McKeon*, 6 Duer, 203; 569. *Dodge v. Crandall*, 30 N. Y. 294;

(y) *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 143. *Barnes v. Lloyd*, 1 How. (Miss.) 584; *Steptoe v. Harvey*, 7 Leigh, 501; *Tompkins v. Tompkins*, 21 N. J. 338, citing cases; see *Chiles v. Jones*, 3 B. Mon. 51.

(x) *Stearns v. Hall*, 9 Cush. 31.

(a) *Whittier v. Dana*, 10 Allen, 320.

(b) *Bailey v. Ricketts*, 4 Ind. 490.

(c) *Frost v. Everett*, 5 Cow. 497.

(d) *Carrier v. Dilworth*, 59 Pa. St. 410; *Grafton Bank v. Woodward*, 5 N. H. 107; *McMurphy v. Garland*, 47 N. H. 316; *Fleming v. Gilbert*, 3 Johns. 528; *Flynn v. McKeon*, 6 Duer, 203; *Dodge v. Crandall*, 30 N. Y. 294; *Barnes v. Lloyd*, 1 How. (Miss.) 584; *Steptoe v. Harvey*, 7 Leigh, 501; *Tompkins v. Tompkins*, 21 N. J. 338, citing cases; see *Chiles v. Jones*, 3 B. Mon. 51.

(e) *Betts (Re)*, 4 Dill. C. C. 97; 15 Nat. Bank Reg. Rep. 537; *Burt v. Saxton*, 1 Hun, 551; 4 Th. & C. 109.

(f) *Hoffman v. Lee*, 3 Watts, 356.

(g) *Trayser v. Trustees of Indiana &c. University*, 39 Ind. 567.

then and there—but no actual tender was made. It was held that the defence was good to prevent a decree for the whole of the principal, but that the plaintiff was entitled to judgment for the amount of interest due, with costs.^(h) The oral enlargement of the time for making an award is good, and is regarded as continuing the sealed submission, as a written parol submission.⁽ⁱ⁾

In a Maryland decision it was said that “whether, to have the effect of discharging the surety in a bond, or a guarantor under seal, an agreement for extension of time of payment, in all other respects valid, may be by parol, or whether it must be under seal, we are not to be understood to decide. There are conflicting authorities on the point, and we are not called on to decide it in this case.”^(j) The surety was, in a case in Maine, held to be discharged where the principal was given a written extension of time.^(k) And in North Carolina where the extension was verbal.^(l) In England it has been held that at law the surety is not discharged because the oral extension of time is invalid, but

(h) *Asendorf v. Meyer*, 8 Daly, 278, where the time of performance of a contract under seal was not specified in the contract. The parties met, however, on a certain day with a view to perform. The vendor was ready, and produced the deed according to the stipulation of the contract. The vendee, saying that he was not yet ready, asked for more time, and the parties then agreed, by writing not under seal, endorsed upon the original contract, upon a certain day. They met again at that time, but vendee made default, whereupon the vendor sold to a third party, and the first vendee brought suit to recover earnest money paid at the time of making the contract of sale, on the ground, *inter alia*, that the agreement fixing the time for performance being by parol could not alter the contract under seal; that there was therefore no time fixed for performance, and that vendor could not exact performance on the day set. It was held that the time could be agreed upon by parol, not having been fixed by the contract under seal, and when

so agreed upon was an essential part of the contract. *Lawrence v. Miller*, 86 N. Y., 132 citing cases; see also *Coates v. Sangston*, 5 Md. 121.

(i) *Bloomer v. Sherman*, 2 Edw. 452; see *Coates v. Sangston*.

(j) *Hayes v. Welles*, 34 Md. 516; the court adding:—“That a parol contract is not sufficient is held in *Tate v. Wymond*, 7 Blackf. 240, where the case of *Davey v. Prendergrass*, 5 Barn. & Ald. 187, is relied on, whilst the contrary is held in *United States v. Howell*, 4 Wash. C. C. R. 620, where Mr. Justice Washington reviews the case in 5 Barn. & Ald., and supposes that it was not meant to hold that position, but concludes that if it does, he dissents from it, for the reasons which he assigns.”

(k) *Phillips v. Rounds*, 33 Me. 357.

(l) *Carter v. Duncan*, 84 N. Car. 676, citing *Burnes v. Allen*, 9 Ired. 370; *Harshaw v. McKesson*, 65 N. Car. 688; *Pipkin v. Bond*, 5 Ired. Eq. 91; *Scott v. Harris*, 76 N. Car. 205, and modifying *Bank v. Lineburger*, 83 id. 454.

semble secus in equity.(m) The action on a specialty modified, as by enlarging the time of performance, is *assumpsit*. Thus in Vermont it has been held that if the time of performance is extended, the original contract being under seal, the extension must be under seal, so as to enable the party to recover upon the contract after full performance according to the enlarged time. But if the time be enlarged in which to perform the contract by consent of the parties, but by parol, the recovery may be had in *assumpsit*.(n) So in Pennsylvania, where there was *assumpsit* on a contract under seal for delivery of goods, the time for delivery of which had been subsequently extended by parol, it was held that evidence of a parol agreement and of sealed writings was admissible in the action of *assumpsit*.(o)

As will be seen, the rule permitting the subsequent enlargement of the time of performance of a written contract has been denied, and this denial included the case of specialties. Thus oral evidence of the change in the time of performance of a bond has been held no defence, though the defendants had accepted performance from the plaintiffs after day.(p)

Where a covenant was given to convey land free of incumbrance by a certain day, and the land not having been surveyed by that day, the vendee indulged the vendor, it was held, in an action by the former against the latter for a sum named in the deed as damages to be paid for a failure of either party to comply with the covenants thereof, that the extension of time was not a contract, and if a contract was within the Statute of Frauds.(q) In an early English case the extension of time of payment of a bond before breach was held to be invalid by parol.(r)

§ 465. The exception by which the extension of the time of performance of a written contract within the Statute of Frauds

(m) *Davey v. Prendergrass*, 5 B. & Ald.

(n) *Barker v. Troy &c. Railroad*, 27 Vt. 766; see *Sherwin v. Rutland &c. Railroad*, 24 Vt. 347; *Bloomer v. Sherman*, 2 Edw. 452; *Munroe v. Perkins*, 9 Pick. 299. See *Baker v. Whiteside*, Breese, 132.

(o) *Carrier v. Dilworth*, 59 Pa. St. 406; see *Porter v. Stewart*, 2 Atk. 424, which, denying the admissibility, in a suit of covenant on a deed, of oral evi-

dence to show as a defence a change in the time of performance, distinguished *Cuff v. Penn* as being an action of *assumpsit*.

(p) *Porter v. Stewart*, 2 Atk. 424 (an interesting case), *distinguishing Cuff v. Penn*, as above.

(q) *Hasbrouck v. Tappen*, 15 Johns. 202.

(r) *Hayford v. Andrews*, Cro. Eliz. 697; *Moo*, 573; see 5 Com. Dig. 261.

Oral subsequent enlargement of time held invalid. can be agreed upon verbally has not met with universal approval, and no longer prevails in England.^(s) Some authorities, while looking against the doctrine, do not positively pass upon it.^(t)

The later English doctrine begins with *Stead v. Dawber*, which held that the time of performance of a contract was of its essence, especially where the subject of the agreement was of a fluctuating value, and that therefore an extension of the time could not be validly made by parol where the Statute of Frauds applies to the original agreement; in the particular case the delay agreed upon was but for two days. Lord Denman exposed the paradox by which^(u) the plaintiff suing on the contract contended that the defendant was inconsistent in first alleging that there was a delay orally agreed upon, and then in claiming such agreement to be invalid. As will be seen in another place, it is a good defence to show that there was an invalid oral agreement which, while not enforceable, will suffice to prevent the enforcement of the written contract modified by it. See § 481, and the chapter on Defence. The English rule is the same both as to lands and goods.^(v)

Where a written contract for sixteen and two-thirds tons each month for ten months, the payment to be in a particular way speci-

^(s) *Plevius v. Downing*, 1 C. P. D. 224; 35 L. T. N. S. 263; 45 L. J. C. P. 695; *Noble v. Ward*, L. R. 1 Exch. 117; *Hasbrouck v. Tappen*, 15 Johns. 200; and see *Doar v. Gibbes*, 1 Bail. Ch. 371.

The question was suggested in *Noble v. Ward*, L. R. 1 Exch. 121, as to whether a new oral contract enlarging the time of a written one, though invalid in itself, might do away with such previous one, if the jury found as a fact that such was the intention of the parties.

^(t) *Hogan v. Crawford*, 31 Tex. 635; *Deshazo v. Lewis*, 5 Stew. & Port. 94; *Wilgus v. Whitehead*, 89 Pa. St. 131; *Fitzgerald v. McCullagh*, 7 Ir. C. L. Rep. 457; 3 Ir. Jur. N. S. 226; *Emerson v. Slater*, 22 How. (U. S. S. C.) 41.

Thus it has been said that an oral extension of time of written contract is good when the other party is thrown off his guard, because there is an estoppel.

^(u) *Stead v. Dawber*, 10 Ad. & Ell. 63, overruling in effect *Cuff v. Penn*, 1 M. & S.; the court said that *Cuff v. Penn* and *Goss v. (Lord) Nugent* were hard to reconcile. See *Marshall v. Lynn*, 6 M. & W. 116, commenting on *Stead v. Dawber*.

^(v) *Marshall v. Lynn*, 6 M. & W. 116, saying that *Stead v. Dawber* overruled *Cuff v. Penn*. Alderson, B., speaking of the 4th and 17th sections of the Statute of Frauds, said: "There is undoubtedly a distinction between the two enactments, for by the 4th section the whole contract must be in writing, including the consideration, which induced the party to make the stipulation by which he is to be bound; but by the 17th section, it is sufficient if all the terms by which the defendant is to be bound are stated in writing, so as to bind him."

fied, is changed by parol to be for one hundred and twenty-eight tons in December, and no arrangement is made for payment, the Statute of Frauds applies.^(w) Where a hundred tons of iron was to be all delivered before the end of July, and at the end of July but seventy-five tons were delivered, and in October the defendants, the buyers, requested a delivery of the twenty-five tons remaining, and these were forwarded but not to the defendants, who wrote refusing to receive them, there can be no recovery on the old contract because of the failure of the plaintiff to fulfill, nor on the new, because of the Statute of Frauds. The court said that a mere delay by the plaintiff at the^(x) defendant's request, made while the plaintiff was not yet in default, would not prejudice a recovery, because the plaintiff could aver his readiness and willingness at all times to perform; but where in order to justify^(y) his failure to perform he must aver an agreement, whether made before or after the time of performance had come, by which he was given delay, the Statute of Frauds at once applies. In the principal case no averment of readiness to perform would have been sustained by the evidence.^(z)

In *Hickman v. Haynes* the court said: "The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. In conclusion, we think, although the plaintiff assented to the defendant's request not to deliver the twenty-five tons of iron in question in June, he was, in truth, ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary.

^(w) *Tyers v. Rosedale Iron Co.*, L. R. 8 Exch. 315. Martin, B., dissented, thinking, among other things, that the parol agreement was not for the sale of goods, but for their delivery, the sale having already been made.

^(z) *Plevius v. Downing*, L. R. 1 C. P. D. 225.

^(y) Citing *Hickman v. Haynes*, L. R. 10 C. P. 605.

^(s) See *Ogle v. Earl Vane*, L. R. 2 Q. B. 275.

The plaintiff, not having bound himself by any valid agreement to give further time, but having, for the convenience of the defendants, waited for a reasonable time after the letter of the 9th of August to enable the defendants to perform the contract on their part, is entitled, on the expiration of that time, to treat the contract as broken by the defendants at the end of June, when in truth it was broken.”(a)

§ 466. The English rule has been followed in Rhode Island in a case the facts of which were as follows: The plaintiff sued on a written contract to sell certain land with the houses thereon being built, the houses to be finished by July 1st. The plaintiff further alleged a parol agreement extending the time for completing the houses to July 14th, and averred performance by July 14th, a tender of conveyance and refusal to accept by the defendant.(b) In an early case in New York the later contract held invalid, because oral, not merely extended the time but in other respects(c) changed the contract. So it is the law in Michigan that a subsequent oral extension of the time of performance of a written contract relating to land and within the Statute of Frauds is invalid.(d) It is inadmissible, in a suit for damages for non-conveyance, to show that the time of performance was extended where the latter was fixed

(a) *Hickman v. Haynes*, L. R. 10 Q. B. 605, citing cases.

(b) *Ladd v. King*, 1 R. I. 231, denying *Cuff v. Penn*, and saying that the case put by Lord Ellenborough of a substituted delivery, which was accepted, was not a fair analogy. The exception makes a new executed contract, the parol agreement in *Cuff v. Penn* being executory. The substituted agreement, if the original one and if invalid by parol, could not have been if executory, why should it be good as executory; and what aid does it derive from the fact that the agreement for which it is substituted is in writing? The court also said, that in *Stowell v. Robinson*, it was held that the time of performance of a written contract for the sales of lands could not be enlarged by parol. And that *Blood*

v. Goodrich, 9 Wend. 78, was to the same effect as *Stowell v. Robinson*. The court passing also upon *Cummins v. Arnold*; Judge Wilde followed *Cuff v. Penn*, apparently regarding a tender of performance of the substituted contract as equivalent in its effect to actual performance, under which reasoning a verbal substitution of *Whiteacre* for *Blackacre* agreed by writing to be sold, would be valid if an offer to convey *Whiteacre* is made. A tender, it was further said, is no accord and satisfaction, and there is no difference in these respects between a change of time and a change of subject-matter.

(c) *Hasbrouck v. Tappen*, 15 Johns. 204.

(d) *Abell v. Munson*, 18 Mich. 312, citing cases; *Cook v. Bell*, Id. 387.

by a written contract, and where the consideration for the last was paid.(e) And the rule in Vermont applies to goods as well.(f) The time of payment of a note cannot, under § 100 of the New York Code of Procedure, be extended by parol.(g)

§ 467. Before taking up some rulings analogous to that under discussion, it will be well to distinguish one or two de- Further
cisions which might seem discordant with the principles points as to
just laid down. In accordance with what was said in this last rule.
Plevius *vs.* Downing, it has been held that waiting or giving delay without agreeing to do so does not affect the original agreement; there is no new oral contract, but the mere fact of time given.(h) In an Illinois case, where there was a bond and a written agreement, and part of purchase-money paid in a sale of land, and a new and subsequent parol agreement for the execution of a new bond for the deed by the vendor and of new notes of like tenor as the old, except as to time of performance, and the old bond and notes were surrendered; but the vendor refused to carry out the verbal agree-
ment or to give a bond for a deed, there being no rescission in fact of the written contract; it was held that the old agreement was in force, unaffected by the unexecuted verbal agreement.(i) Oral evidence of the subsequent enlargement of the time of performance of a written contract within the Statute of Frauds was not admissible under the former limited jurisdiction of chancery in Massachusetts, which only extended to written contracts; and where there had been a written contract to make a deed when certain notes were due, oral evidence to show that the agreement had been changed to make the deed before the notes were due, was inadmissible on behalf of the plaintiff seeking to have the contract reformed and specifically enforced.(j)

The time of a contract, required to be in writing by the act of Congress, June 2d, 1862, cannot be orally extended.(k) And the principle has been applied to bonds. Thus in a suit on a bond parol evidence of a change in the time of performance of a condition pre-

(e) *Blood v. Goodrich*, 9 Wend. 79.

(i) *Mathison v. Wilson*, 87 Ill. 52.

(f) *Packer v. Steward*, 34 Vt. 133.

(j) *Brooks v. Wheelock*, 11 Pick.

(g) *McDowell v. Blanchard*, 5 N. Y. 439.

Week. Dig. 410 (S. C. N. Y.)

(k) *Jones v. United States*, 11 Ct. of

(h) *Ogle v. Earl Vane*, L. R. 2 Q. B. Cl. 740.

275; 9 B. & S. 172; 7 id. 855.

cedent is not admissible; and though the defendants had accepted the performance (payment) after the day, they could still object to the plaintiff recovering on the bond, because of the non-performance of the conditions thereof.(l)

§ 468. Like every other feature of the subject of the Statute of Frauds, this now under consideration receives a different coloring when in equity. There is no doubt that a later oral contract modifying a previous written one will be supported when it would be fraud upon either party not to carry out the change.(m) A written agreement for the sale of land cannot be altered by a subsequent parol agreement; equity will, however, declare it rescinded when the opposite party can be put in *statu quo*; equity will sometimes rescind where it would refuse specific performance. An oral promise by the mortgagee to extend the time of payment is good where a third person takes land on faith of the promise, this being the rule in equity, relaxing the very strict doctrine of the common law.(n) The ordinary instance of such reliance upon the invalid contract as will cause the equitable principle to apply, is where one of the parties has partly performed the contract, making it impossible or unjust to refuse a completion of the agreement, and so also where there has been complete execution.(o) By an executed oral agreement the terms of a previous written one may be changed.(p)

The general rule in equity as to subsequent oral modification of a writing. Part performance.

The rule was well stated in a Virginia decision: "The

(l) *Porter v. Stewart*, 2 Ark. 424; *Haskell v. Ayres*, 35 Mich. 89; *Lattimore v. Harsen*, 14 Johns. 330; *McDonald v. Mountain Lake Co.*, 4 Cal. 375; *Munroe v. Perkins*, 9 Pick. 299; *Adams v. Nichols*, 19 Pick. 278; *Whiting v. Heslep*, 4 Cal. 327; *Wilkins v. Evans*, 1 Del. Ch. 157; *Lefevre v. Lefevre*, 4 S. & R. 241; *Ong v. Campbell*, 6 Watts, 396; *Carpenter v. Murphree*, 49 Ala. 84, citing cases; *Johnson v. Worthy*, 17 Ga. 420; *Cutler v. Smith*, 43 Vt. 581; see *Walker's American Law*, page 460, notes, citing cases.

(m) *Fitzgerald v. McCullagh*, 7 Ir. C. L. Rep. 457; 3 Ir. Jur. N. S. 226; *Clifford v. Kelly*, 7 Ir. Ch. 333; *Long v. Hartwell*, 5 Vroom, 121; see *Keeler v. Tatnell*, 3 Zab. 62; *Huffman v. Hummer*, 3 C. E. Green, 89; see *Williamson v. Paxton*, 18 Gratt. 491.

(n) *Hoffman v. Lee*, 3 Watts, 356.

(o) *Price v. Dyer*, 17 Ves. 363; *Thornton v. Ludwig*, 6 Ohio St. 1; *Kelly v. Stanberry*, 13 Ohio, 408;

(p) *Adams v. Nichols*, 19 Pick. 278.

question is whether an executory contract in writing, creating an equitable interest in land, may not in equity be rescinded, waived, or abandoned by a subsequent distinct and independent parol agreement between the parties, partially acted on or fully performed by them. If part performance of an original parol contract be sufficient in a court of equity to withdraw the case from the operation and influence of the Statute of Frauds, as it unquestionably is, no good reason is perceived why part or full performance of a subsequent distinct and independent parol contract, rescinding the former contract for full consideration, and substituting another in its place, should not in like manner withdraw the latter contract from the influence of the statute.(g) It has also been said that equity will not allow the Statute of Frauds to be used as an instrument of fraud, and will decree specific performance, or hold the maker of a parol contract estopped from denying it when the other party by virtue of it, and under and in pursuance of it, has so far acted as that it would be aiding in a fraud to permit the contract to be repudiated. But the party setting up such parol contract must show he has done some act in performance of the contract upon his side, which act of performance has put him in a new position.(r) So it has been said that the policy of the Statute of Frauds is not against admitting proof of the execution of the substituted performance accepted and enjoyed by the vendee, and as establishing an abandonment or surrender of the stipulation.(s) Where the time of performance has been extended and the contract is then fulfilled, it cannot be contended that, the later stipulation being void, the original agreement unchanged is to prevail.(t) The principle of accord and satisfaction applies to validate an oral modification of a previous writing, and this on the analogy of performance.(u)

§ 469. The following are some examples of the application of the rule before us. Thus, where a store subject to a certain right of way was bought by the plaintiff, and the right of way had been expressly released, and the defendant,

Examples.

(g) *Phelps v. Seeley*, 22 Gratt. 585.

(r) *Simonton v. Liverpool &c., Co.*, 51 Ga. 80.

(s) *Long v. Hartwell*, 5 Vroom, 121.

(t) *Botts v. Cozins*, 1 Hoff. Ch. Rep. 79; see *McMurphy v. Garland*, 47 N. H. 316.

(u) *Hall v. Stewart*, 5 Day, 431; *Harper v. Hampton*, 1 Harr. & Johns. 625; *Keeler v. Salisbury*, 27 Barb. 485; *Cabe v. Jameson*, 10 Ired. 193; *Cordwint v. Hunt*, 8 Taunt. 596.

who bought a certain property to which the right of way also belonged, that it might be released; on the ground of part performance it was held that the right of way was released, though it should have been by deed.(v) So where the plaintiff by writing granted privileges in land to the defendant, who was to repair a dam thereon, and it was afterwards orally agreed that the plaintiff should instead build a new dam, the defendant to pay half the cost, and the new dam was built.(w) Where, after a certain time the vendor of land can rescind if full payment is not made, the partial payment to go as rent, he waives the right by receiving partial payment after the day.(x) Where, by the terms of a written contract, a certain liability could be fulfilled by a conveyance of land or a payment of money within a fixed time, an acceptance of money after this date will bind the person accepting.(y)

Where C. agreed in writing to sell the plaintiff his two lots of land, the plaintiff to pay part cash and to give a mortgage for the remainder, and C. conveyed one lot, and a payment on account was made by the plaintiff, it was held, the latter not having tendered the mortgage as agreed, and the acceptance of the deed being presumed as complete execution of the agreement between the parties (though it was only for one lot), that the Statute of Frauds did not prevent parol proof of an executed contract substituted for a written one, and the plaintiff could not have damages for the non-conveyance of the other lot.(z) When the parol rescission is fully executed by the vendee giving up a bill of sale and the vendor a note given for the price, the chattel sold never having been actually delivered, the Statute of Frauds does not apply to a rescission thus carried into execution.(a) A sealed contract to sell land may be totally rescinded by oral contract later, especially where under the terms of the rescission the land is to be sold to a third person, and is actually conveyed to the latter.(b) Parties to an arbitration made by deed may verbally add to the subject of the arbitration by mutual consent, and if the arbitrators try these points and make their award, neither party can object.(c) The principle of part per-

(v) *Pope v. O'Hara*, 48 N. Y. 452.(w) *Jackson v. Litch*, 62 Pa. St. 451.(x) *Stewart v. Cross*, 66 Ala. 28.(y) *Kimball v. Goodburn*, 32 Mich.(z) *Long v. Hartwell*, 5 Vroom, 121.(a) *Norton v. Simonds*, 124 Mass. 19.(b) *Phelps v. Seeley*, 22 Gratt. 585.(c) *Woods v. Page*, 37 Vt. 252.

formance has been extended to the subsequent oral modification of a contract of insurance required to be in writing.(d) Where possession is taken under a contract and then the agreement is altered, possession originally taken is not part performance of the contract as altered.(e)

§ 470. The subsequent oral change even of a specialty will, if partly performed, be valid.(f) In a case in 3 Johnson *Specialties*. it was held that oral evidence to show that the time of performance of a bond had been enlarged was admissible, and where the contract had been substantially though not literally performed, oral evidence could be adduced to show that the obligee waived further performance.(g)

By the law of Scotland a written agreement cannot be waived or varied by words only; and if the permitted waiver or variation rests entirely on parol, there remains a *locus pœnitentiæ* to the person who has consented to the waiver or variation. It cannot be enforced against him. But if after a parol agreement has been made there is what the law calls *rei interventus*; that is, if there are acts and circumstances following upon the agreement in performance of it, then it is no longer revocable. It is as valid as if

(d) *Simonton v. Liverpool Co.*, 51 Ga. 80.

(e) *Price v. Salisbury*, 14 L. T. N. S. 111, 32 L. J. Ch. 448, 32 Beav. 459. As another example of insufficient part performance, see *Price v. Dyer*, 17 Ves. 363; *French v. New*, 28 N. Y. 150.

Where the plaintiff had a written agreement of sale of land from B., a defendant, and verbally agreed with the latter, that if B. would do certain things the original contract should be rescinded, and afterwards B. offered to fulfill these conditions; but the plaintiff insisted on the written contract; and B. afterwards conveyed the land to another defendant, P.: It was held, that the parol agreement of rescission, even though performed by B., did not bind the plaintiff, though B. offered to fulfill its conditions, and that the utmost effect of the parol contract would be, if P. had

been fraudulently induced by the plaintiff to rely upon this parol rescission being carried out, to rebut the plaintiff's equitable title under the written contract, but that when the plaintiff had once disavowed the parol rescission, and insisted on the original written contract, P., though he had the legal title to the land, could not hold as against the plaintiff's equitable one, as he had taken with notice of the latter; *Gaines v. Bryant*, 4 Dana, 398.

(f) *Smithwick v. Killaloe Slate Co.*, 5 Ir. C. L. 559; *Nash v. Armstrong*, 10 C. B. N. S. 259; *Townsend v. Stone Dressing Co.*, 6 Duer, 208; *Jenks v. Robertson*, 2 Th. & C. 255, citing cases. See, however, *Kuhn v. Stevens*, 7 Roberts. 544, where part performance was held not to validate the oral modification of the sealed contract.

(g) *Fleming v. Gilbert*, 3 Johns. 528.

it had been made in writing.(h) Even through the subject of the specialty was sale or other subject of the Statute of Frauds, the subsequent oral change, is partly or wholly performed, is good.(i) The change may be an extension of the time of performance(j) or a total rescission.(k) How far a debt of record can be orally released so as to bind one of the parties to the release, when another has advanced money upon faith of the latter, is asked in a New Jersey case.(l)

§ 471. Besides the important exception of part performance there is in many instances still another one to the strict rule of the Statute of Frauds, viz., that in which the validity of an oral agreement is sustained when it is offered only as a defence. The general rule being that a written contract cannot be altered by a subsequent oral one, and thus altered be specifically enforced;(m) it is also well established that for the purpose of defence merely the oral contract is available,(n) and specific performance will be refused even in cases under the Statute of Frauds.(o) To rebut an equity such an oral contract is admissible.(p) In a case in 17 Vesey, Sir William Grant remarked that it was said: "It is then said that the agreement was waived; and that a written agreement may be so far waived by parol that the court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving that there was in this case any waiver, within the meaning of the dicta, or decisions, upon this subject, it

(h) *Bargaddie Coal Co. v. Wark*, 3 Macq. 477.

(i) *Phelps v. Seely*, 22 Gratt. 585; *Lawrence v. Barker*, 8 N. Y. W. Dig. 553 (N. Y. C. P.); *Beach v. Covillard*, 4 Cal. 315; *Cooke v. Murphey*, 70 Ill. 96; *Howard v. Gresham*, 27 Ga. 347.

(j) *Flynn v. McKeon*, 6 Duer, 203.

(k) *Green v. Wells*, 2 Cal. 584; *Dearborn v. Cross*, 7 Cow. 49; *Munroe v. Perkins*, 9 Pick. 305; *Martineau v. May*, 18 Wis. 56.

(l) *Terhune v. Colton*, 2 Stockt. 35.

(m) *Price v. Salusbury*, 32 Beav. 459; *Stevens v. Cooper*, 1 Johns. Ch. 449; *Stoutenburgh v. Tompkins*, 1 Stockt. 335. See chapters on Defence and on Fraud.

(n) *Ratcliffe v. Pemberton*, 1 Esp. 35;

Stevens v. Cooper, 1 Johns. Ch. 429; *Marsh v. Bellew*, 45 Wis. 49-52; *Seymour v. Carter*, 2 Metc. 521; *Long v. Hartwell*, 5 Vroom, 121; *Trayser v. Trustees Ind. Univ.*, 39 Ind. 567; *Buel v. Miller*, 4 N. H. 196; *Grafton Bank v. Woodward*, 5 id. 108; *Dana v. Hancock*, 30 Vt. 619; *Fleming v. Martin*, 2 Head, 43; *Morrill v. Colehour*, 82 Ill. 625.

(o) *Gary v. Hull*, 11 Johns. 441; *Dearborn v. Cross*, 7 Cow. 48; *Baldwin v. Salter*, 8 Paige, 473; *Barnard v. Darling*, 11 Wend. 30; *McCorkle v. Brown*, 9 Sm. & M. 167; *Renshaw v. Gans*, 7 Pa. St. 118.

(p) *Legal v. Miller*, 2 Ves. Sr. 299.

is not necessary for me to give a precise opinion upon the point; but, as at present advised, I incline to think that upon the doctrine of this court such would be the effect of a parol waiver, clearly and satisfactorily proved;" and adding that in the case before him there was no rescission. His Honor further said that "the question, then, is upon the effect of the variations said to be agreed upon. Variations, so acted upon that the original agreement could no longer be enforced without injury to one party, would be a bar to a specific performance of that original agreement. Such was the case of *Legal v. Miller*. The original agreement was unexceptionable; but the execution of it under the new circumstances would have been a fraud upon the landlord; having rebuilt, instead of repairing, the houses, and the tenant having agreed to pay an additional rent in consideration of the additional expense verbally agreed upon."(*g*)

The oral abandonment of a contract for a lease shown by submission to a new and inconsistent one, is a good equitable defence to specific performance.(*r*)

In a case which perhaps belongs rather to the difficult category of those which deal with the question whether a written contract under the Statute of Frauds can be shown to be in fact incorrect (see § 323), Lord Cottenham said: "If the court finds a written contract has been entered into, and the plaintiff says, 'That was agreed upon, but then there were certain other terms added or certain variations made,' the court holds that in such a case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties, and therefore refuses specifically to perform such an agreement. On the other hand, it is quite competent for the defendant to set up a variation from the written contract, and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for."(*s*)

(*g*) *Price v. Dyer*, 17 Ves. 363.

(*s*) *London & Birmingham R. W. v.*

(*r*) *Gilbert v. Hall*, 1 L. J. Ch. 15.

Winter, Craig & Phill. 62. Lord Cot-

See also *Fitzgerald v. McCullagh*, 7 Ir. C. L. Rep. 457; 3 Ir. Jur. N. S. 226.

tenham also said: "That this is the rule of the court is sufficiently estab-

§ 472. Where specific performance is sought of a written contract within the Statute of Frauds, an oral rescission or alteration can be proved as a defence,^(t) and equity will sometimes rescind upon evidence which would not justify a decree of specific performance.^(u) A party to an agreement may resist the specific performance of it because of the waiver by parol, or by acts of the other party which induce a presumption of abandonment.^(v) Upon a dispute about terms, &c., and the whole contract being rescinded, specific performance would not be decreed of the original contract.^(w) It is a good equitable defence where a stipulation in writing for an unincumbered title is waived by parol, and it is through the plaintiff's neglect that certain incumbrances remain.^(x)

Although a contract in writing cannot be varied by parol testimony, yet it may be shown thus that the performance of it has been prevented or waived by the opposite party.^(y) Where a person who held the title for a joint interest was to sell and pay the profits, and there was no agreement that he should under any circumstances convey the land to the other parties, the defendant gave a written contract to pay the profits to the partners upon their paying their portion of the purchase-money; the plaintiff, upon being discharged of this agreement, verbally released the defendant upon his written agreement; it was held that the verbal contract would be a good defence to the specific performance of the writing.^(z) It is a good defence to an action for the specific perform-

lished in many cases, of which I will only mention three—*Joynes v. Statham*, 3 Atk. 388, by Lord Hardwicke; *Townshend v. Stangroom*, 6 Ves. 328, by Lord Eldon; and *Ramsbottom v. Gosden*, 1 Ves. & Beames, 165, by Sir William Grant. In the last-mentioned case Sir William Grant put it to the plaintiff whether he would take a specific performance with the performance of the condition established by parol testimony, or whether he would have the bill dismissed."

(t) *Lucas v. Mitchell*, 3 A. K. Marsh. 244; *King v. Morford*, Saxt. 289.

(u) *Espy v. Anderson*, 14 Pa. St. 808.

(v) *Ong v. Campbell*, 6 Watts, 396.

(w) *Bowman v. Cunningham*, 78 Ill. 48.

(x) *Devling v. Little*, 26 Pa. St. 502.

(y) *Medomak Bank v. Curtis*, 24 Me. 38; *Dana v. Hancock*, 30 Vt. 619.

(z) *Morrill v. Colehour*, 82 Ill. 625, citing *Goss v. Lord Nugent*, 5 Barn. & Adolph. 64; *Bell v. Howard*, 9 Mod. 302, and *Stevens v. Cooper*, 1 Johns. Ch. R. 49. These cases hold that where a party sues to have a contract specifically performed the defendant may prove that the contract was abandoned by a verbal agreement, and this is upon the principle that the court will never decree that a contract be performed when to do so it would be inequitable or oppressive.

ance of a written contract to convey land that there was a subsequent oral agreement that the defendant was to retain the title until repaid other money lent by him than that mentioned in the original contract.(a)

Where the defendant bought a tract of land, to pay for it at so much per measure for the timber thereon, and it was afterwards orally agreed that for the fallen and damaged timber a smaller sum per measure was to be paid, it was held that as it was doubtful whether, apart from the oral agreement, the plaintiff could have recovered for the timber fallen, &c., at the price fixed in the writing, and as, *semble*, the written contract as modified could have given a right of suit to the plaintiff as on an oral promise, the latter was available as a defence to prevent the plaintiff recovering more than the price fixed by the agreement, though the agreement might be considered as one within the Statute of Frauds.(b)

In an action for use and occupation the defendant was a yearly tenant, and held over after expiration of his term: it was *held* that the presumption that he held as tenant from year to year was rebutted by proof of a subsequent parol agreement to rent for a year certain, though such agreement was void under the statute, because not to be performed within a year from the *making* thereof; and therefore the defendant was not liable to pay rent quarterly according to the terms of original lease.(c) Specific performance is refused where by parol a new contract is substituted for the old; and if the defendant does not set up the statute, specific performance will be decreed of the substituted contract.(d) An oral rescission in equity is good as a defence to a suit for specific performance, but must be clearly proved and fulfilled,(e) and, *a fortiori*, an oral alteration of a written contract is a good defence when executed entirely or in part.(f)

Where there was an oral agreement without consideration, by which the plaintiff was to take a substituted title for that of the land as agreed in writing to be conveyed him, and the new contract was performed by the defendant, the plaintiff cannot have specific performance of the original agreement.(g) The oral rescission of a

(a) *Hewlett v. Miller*, 9 Pacific Coast Law Reporter, 812 (S. C. Cal.)

(b) *Marsh v. Bellew*, 45 Wis. 49.

(c) *Crommelin v. Theiss*, 31 Ala. 412.

(d) *Ryno v. Darby*, 5 C. E. Green, 231.

(e) *Walker v. Wheatley*, 2 Hump. 119.

(f) *Beach v. Covillard*, 4 Cal. 315.

(g) *Lawrence v. Dole*, 11 Vt. 555.

written contract relating to land is, when executed, a good defence to an action for specific performance.^(h) That the parties have acted on the rescission of a contract relating to land is sufficient, though the writing was intended to be canceled or surrendered, but was not so,⁽ⁱ⁾ and this applied to a case of mere cancellation, where the vendee had paid no purchase-money.^(j)

On a bill for specific performance of contract for sale of land, it is competent for the defendant to prove a parol discharge or waiver of performance, possession being taken and purchase-money having been paid.^(k) A defendant, or plaintiff as well, it has been said, may avail himself of parol evidence to prove an accord executed in discharge of a written agreement previously made.^(l) In New Jersey the present doctrine of equitable defence has received some qualification, the court in a case in Stockton saying: "A defendant cannot resist a specific performance on the ground that the agreement entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident, or surprise."^(m) But there is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the true intention of the parties, and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious that the intention should be carried out. A written contract may be abandoned by parol, if not so far as to destroy the rights of the parties at law, at least so far as to constitute a good defence to a bill for specific performance. So, if it has been varied by a subsequent parol agreement which has been carried out, and so acted upon by the parties that the written agreement cannot be enforced without injury to one party, it is a good ground of defence, and may be proved as such.⁽ⁿ⁾

It has been held that performance of the oral contract is necessary;

^(h) *Baldwin v. Salter*, 8 Paige, 473. ^(l) *Hall v. Stewart*, 5 Day (Conn.)

⁽ⁱ⁾ *Boyce v. McCullagh*, 3 W. & S. 431.

432; *Cornwell v. Spence*, 1 Harp. Ch. 259.

^(j) *Raffensberger v. Cullison*, 28 Pa. St. 439.

^(k) *Tolson v. Tolson*, 10 Mo. 736, citing several cases in the *Vesey*s.

^(m) *Stoutenburgh v. Tompkins*, 1 Stockt. 332; saying that the case of *Legal v. Miller* does not, on careful examination, establish a contrary doctrine.

⁽ⁿ⁾ *Stoutenburgh v. Tompkins*, 1 Stockt. 337.

thus, where the defendant had executed a written agreement to the plaintiff to take up certain notes of J., it was afterwards agreed by parol that inasmuch as the plaintiff's father's estate, of which the plaintiff was administrator, owed J. a certain sum, and as J. owed the defendant a certain sum, that the plaintiff should take up J.'s note to the defendant; that J.'s claim on the plaintiff's father's estate should be canceled, and that the defendant's written agreement to the plaintiff to take up J.'s note should also be canceled. It was held that as the parol agreement was never carried out in point of fact, it was no defence—performance being necessary.^(o) Where a subsequent oral contract clearly proved shows a total discharge of a writing within the Statute of Frauds, the proof is good as a defence; but where the proof is otherwise, the original agreement will be specifically enforced, especially where the plaintiff offered to fulfill the oral changes if the defendant so elected. The latter would not elect.^(p)

§ 473. A few miscellaneous points relating to practice and pleading, and this chapter may be closed.

In a bill for specific performance parol evidence varying the written contract was admitted on the part of the defendant without objection by the complainant: it was held that it was too late for the complainant's attorney to interpose the objection in his argument.^(q) The oral extension of the time of performance of a written contract is admissible under the general issue.^(r) In covenant on a charter-party an oral license extending the time of performance is good as a defence, but should be specially pleaded.^(s)

Where proof of performance at day is alleged an oral enlargement of the time named in the instrument cannot be proved.^(t)

A count averring that the time of performance of a contract (*semble*) written was enlarged is not demurrable, because it does not state this latter agreement to have been in writing, and therefore necessitated proof on the plaintiff's part that it was founded on a consideration.^(u)

(o) *Richardson v. Cooper*, 25 Me. 451.

(t) *Higgins v. Lee*, 16 Ill. 501.

(p) *Robinson v. Page*, 3 Russ. 119.

(u) *Bailey v. Ricketts*, 4 Ind. 490.

(q) *Chamberlain v. Black*, 64 Me. 40.

(r) *Frost v. Everett*, 5 Cow. 497.

(s) *Ratcliffe v. Pemberton*, 1 Esp. 35.

See on the subject of pleading, *Thresh v. Rake*, 1 Esp. 53; *Sellers v. Bickford*, 8 Taunt. 31; *Lehigh Coal, &c. v.*

A plea setting up the contemporaneous modification of a writing declared upon must aver the modification to have been in writing.(v)

The following propositions may serve as a more or less accurate summary of the difficult law of this chapter :—

I. Apart from the Statute of Frauds a subsequent oral modification of a writing is valid. § 440 *et seq.* (except in Scotland, § 442, unless there is part performance, § 470; and under the civil law the point seems to be doubtful. § 440).

II. An unsealed writing, being a parol instrument, can be orally modified without violation of the maxim, *Unumquodque dissolvitur eodem ligamine quo ligatur.* § 440.

III. There must be a new and distinct contract clearly proved and upon a sufficient consideration. §§ 441, 445.

IV. Oral evidence of a previous or contemporaneous modification of a writing is (even apart from statute) inadmissible at common law and under the civil law, because the writing is presumed to be *instar omnium.* § 444.

V. There is an exception to this in equity when there is fraud or mistake or part performance, &c. § 444.

VI. A written contract after breach is not susceptible of modification, because it is then extinct. § 446 *et seq.*

VII. And there is authority for the position that a release of damages should be under seal or at least written. § 446 *et seq.*

VIII. The total waiver or rescission of a written contract before breach can be orally proved. § 447 *et seq.*

IX. But there is authority for saying that after the breach the rule is otherwise. § 447 *et seq.*

X. An instrument under seal cannot before breach be modified by a subsequent oral contract. § 448 *et seq.*

XI. The damages arising from the breach of a specialty can be released, or the rights relating thereto be modified in the same way as those arising from the breach of a simple contract. § 448.

Harlan, 27 Pa. St. 429. See Wingall v. (v) Peddie v. Donnelly, 1 Col. 423. Enniskillen Oil Co., 10 Can. L. J. O. S. On the whole subject of this chapter see Broom, Leg. Max., p. *785 *et seq.*

XII. The rule in case of submission to arbitration is especially strict in requiring the subsequent modification to be proved by a specialty or at least a writing. § 451.

XIII. In equity a subsequent modification or release of a written or sealed instrument can, on the ground of fraud or mistake or part performance, be orally proved. § 452.

XIV. A subsequent total release of a specialty can probably be proved by oral evidence. § 453.

XV. The time of performance of a specialty or other writing can be enlarged by parol. § 464.

XVI. The subsequent oral modification of a written contract within the Statute of Frauds is invalid. § 454 *et seq.* *Secus* in Massachusetts and New Hampshire; and see § 458 *et seq.*

XVII. The subsequent total rescission of a written contract within the Statute of Frauds is good. § 461.

XVIII. An enlargement of the time of performance of a written contract within the Statute of Frauds can be orally proved. § 462. *Secus* in England, in Rhode Island, &c. § 465.

XIX. In equity on the ground of part performance, fraud or mistake the subsequent oral modification of a written contract within the Statute of Frauds is good. § 468. (So in Scotland, where there is part performance. § 470.)

XX. At law as well as in equity the subsequent modification or rescission of a written contract within the Statute of Frauds may be good by way of defence. § 471 *et seq.*

CHAPTER XXI.

FRAUD AND MISTAKE.

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| <p>§ 474. Oral contracts within Statute of Frauds when enforceable on the ground of fraud. Statute not a bar to action for fraud. Not to be used as a cover for fraud.</p> <p>§ 475. The rule in equity.</p> <p>§ 476. Examples of the effect of fraud.</p> <p>§ 477. Examples of fraud insufficient to do away with the statute.</p> <p>§ 478. Breach of oral contract not <i>per se</i> fraud.</p> <p>§ 479. Fraud or mistake in not putting the contract into writing.</p> <p>§ 480. Part performance.</p> <p>§ 481. Estoppel.</p> <p>§ 482. Examples of insufficient estoppel.</p> <p>§ 483. Fraud or mistake as a ground for</p> | <p>allowing oral variance of a writing.</p> <p>§ 484. How far the Statute of Frauds prevents such variance; <i>Glass v. Hulbert</i>.</p> <p>§ 485. Examples.</p> <p>§ 486. Part performance. Representations.</p> <p>§ 487. Fraud or mistake in making the memorandum incorrectly or incompletely; not on plaintiff's behalf.</p> <p>§ 488. <i>Glass v. Hulbert</i>.</p> <p>§ 489. Examples of refusal to allow oral variation of writing on plaintiff's behalf.</p> <p>§ 490. Part performance.</p> <p>§ 491. Examples of oral variation of writing on behalf of plaintiff.</p> |
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ELSEWHERE in this work several exceptions to the strict rule of the Statute of Frauds have been treated of, and there is one general exception; that, namely, of cases of fraud or mistake which now calls for particular consideration. In the chapters on Trusts, on Part Performance, and on Marriage Contracts, will be seen some special applications of the doctrine that a statute directed against frauds shall not be employed to perpetrate a fraud. This liberal restraint of the letter of the law to further its spirit and purpose is general in its scope, and applies at large to two important classes of cases: First, those where oral contracts otherwise invalid under the statute are enforceable because of fraud or mistake; and Secondly, those where written contracts are modified or rescinded, decreed to be performed only as corrected by oral evidence, or disannulled because untrue or fraudulent. The second class forms an exception rather to the common-law rule of evidence excluding oral testimony to affect a writing than to the requirements of the

Statute of Frauds, and must be considered by itself; the first class is that more immediately before us.

§ 474. It has been said, then, that the Statute of Frauds is not a bar to an action for fraud,^(a) and in an early Massachusetts case it was suggested that where there was fraud there might be recovery in damages for the breach of an oral contract within the Statute of Frauds. There was no Court of Equity in the State at that time.^(b) The rule has been applied in England in cases not affected by the Statute of Frauds, thus: "An informal written agreement for insurance not properly drawn up as required by the statute, though not admissible to prove a contract, may be admitted to establish fraud, mistake, misrepresentation, &c."^(c) Another manner of stating the principle under consideration is, as has been said, that the Statute of Frauds is not to be used as a cover for fraud.^(d)

Oral contracts within Statute of Frauds, when enforceable on the ground of fraud. Statute not a bar to action for fraud. Not to be used as a cover for fraud.

Sir Thomas Clark, in the middle of the last century, said that frauds were out of the Statute of Frauds; for that the judges resolved it was absurd that a statute made to prevent frauds should be made a handle to support them.^(e) Lord Eldon said that since *Pasley v. Freeman* the guaranty clause of the Statute of Frauds had been considerably cut down, on the ground of fraud.^(f) The Statute of Frauds does not exclude proof of fraud in obtaining a deed to land.^(g) And equity will interpose to prevent the fraudulent use being made of a deed.^(h) Where a deed given under a decree for specific performance of an oral contract issued by an inferior

(a) *Rhodes v. Frick*, 6 Watts, 317; *Miller v. Cotten*, 5 Ga. 340; *Garrett v. Crooks*, 15 La. Ann. 484; *Anon.*, 5 Vin. Ab. 523, pl. 40; *Young v. Young*, 81 N. Car. 98 (*semble*).

(b) *Kidder v. Hunt*, 1 Pick. 331.

(c) *Ionides v. Pacific Ins. Co.*, L. R. 7 Q. B. 525.

(d) *Mestaer v. Gillespie*, 11 Ves. Jr. 638; *Floyd v. Buckland*, *Freeman's Ch.* 268; *Webster v. Webster*, 1 Sm. & Giff. 491, 27 L. J. Ch. 115; *Kilborn v. Forster*, *Drap. U. C.* 346; *Gilpin v. Scovil*, 1 Hann. (N. B.) 379; *Kennedy v. Kennedy*, 2 Ala. 589; *Saulsbury v.*

Blandy, 53 Ga. 667-8; *Klein v. Mc-Namara*, 54 Miss. 99; *Arnold v. Stephenson*, 79 Ind. 137; *Damschroeder v. Thias*, 51 Mo. 103; *Lee v. Lee*, 11 Richardson, Eq. 582; *Sherman v. Scott*, 27 Hun, 331; *Bloomstein v. Cless*, 3 Tennessee Ch. 439, 440.

(e) *Peachy's Case* (not reported), *Rolls E. T.* 1759; see *Sugd. V. & P.* 701, note (page 434, 8th Am. ed.).

(f) *Carr (Ex parte)*, 3 Ves. & B. 110.

(g) *Day v. Lown*, 51 Ia. 367.

(h) *Collins v. Tillou*, 26 Conn. 375.

court, does not bind, because of the Statute of Frauds, where the decree has been reversed.(i) An action for fraud will lie on an oral representation by the defendant's agent that possession of the land would be given within a certain time, whereby the plaintiff was induced to buy; the Statute of Frauds does not apply.(j) Where the oral contract would not have bound the principal, who had duly authorized the agent making the contract, the agent, though having no authority as he fraudulently had represented, is not liable even in tort.(k) In a late Mississippi case the court said that "The utmost limit of the doctrine is, that a person who has failed to obtain what his parol agreement induced him to expect, shall be entitled to recover for any loss directly incurred *by the fraud of the party dealt with*. The case must be such as to sustain an action for deceit, for the rules applicable to which reference is made to the opinion in *Sims v. Eiland* (57 Miss. 607). In this case the damages are greatly in excess of any legal claim of the plaintiff. He is not entitled to recover anything for losses incurred by him, by reason of anything occurring between him and the defendant after December 31st, when he learned of the unwillingness of the defendant to reduce the contract to writing, because of doubt as to his right to sell the land. He is entitled to recover only for what occurred prior to that, and for deceit practiced by the defendant, if he shall establish it."(l)

In an action for fraud in the sale of land the plaintiff can show the colloquium or negotiation between the parties, and by oral evidence the deceit of the defendant in pointing out a wrong boundary.(m) Fraud and mistake are *a fortiori* available in defence; and on this ground an oral contract within the Statute of Frauds may be made use of;(n) and with this proof that of the circumstances and situation of the parties.(o) As a defence to an action for

(i) *Thompson v. Mason*, 4 Bibb, 196.

(j) *Lamm v. Port Deposit &c. Ass.*, 49 Md. 239; see § 496.

(k) *Dung v. Parker*, 52 N. Y. 494.

(l) *Cain v. Kelly*, 57 Miss. 830, saying that "In *Welch v. Lawson*, 32 Miss. 170, the action was maintained because of the bad faith or fraudulent conduct of the seller who refused, without just cause, to consummate the parol con-

tract." As to this latter case, see "Land."

(m) *Sandford v. Rose*, 2 Tyler, 428.

(n) *Osborne v. Phelps*, 19 Conn. 74; *Westbrook v. Harbeson*, 2 McCord, Ch. 115; see *Clark v. Grant*, 14 Ves. 524; as to oral evidence of mistake see *Manzey v. Sellam*, 26 Gratt. 648; *Wood v. Scarth*, 2 K. & J. 28; *Mayer v. Adrian*, 77 No. Car. 84, citing cases.

(o) *Flood v. Finlay*, 2 Ball & B. 9.

specific performance an oral contract within the Statute of Frauds is available.(p) In New Jersey, while it was admitted that oral evidence of fraud or mistake, or subsequent alteration of the contract, was good by way of defence to a bill for specific performance, an oral contract was held not to be under ordinary circumstances any more available as a defence than as a cause of action.(q) An extreme application of the present rule has been the admission of the oral proof of fraud in the procurement of an endorsement by misrepresentation of the pecuniary responsibility of the maker of the note; and this notwithstanding a statute requiring written evidence of representations as to credit, &c.(r)

§ 475. The effect in equity of fraud or mistake is more pronounced than at law, and is there recognized as a well-established exception to the Statute of Frauds.(s) It ^{The rule in equity.} was said in the House of Lords that "the Court of Equity has, from a very early period, decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating, an act of Parliament intervenes, the Court of Equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills,"(t) and where the Statute of Frauds has been most rigidly adhered to the rule is stated to be that the only exceptions which equity can make to the statute are those resting on fraud.(u) Lord Macclesfield said

(p) *Clark v. Grant*, *supra*; *Mayer v. 30 Ohio (Comm.) 185. See 1 Eq. Ca Adrian*, 77 N. Car. 84, citing cases; Ab. 29, pl. 5; Woodesson Lect. *258 *King v. Ruckman*, 21 N. J. Eq. 605. (citing Puffendorff); Batt. on Contr.

(q) *Stoutenburgh v. Tompkins*, 1 L. L. vol. 67) *81 *et seq.*; Story Eq. § 1522; Bisp. Eq. (2d ed.) § 258, page 318; Bigel. on Equity, 177-8; Gresly, Eq. Ev. 207; Whart. Ev. § 909; Greenl. Ev., 13th ed., § 266, n. s.; Parson Contr. III. *397; Bigel. on Fraud, 385; Kerr on Fraud, &c., *passim*.

(r) *Lenheim v. Fay*, 27 Mich. 70.

(s) *Walker v. Walker*, 2 Atk. 100; *Montacute v. Maxwell*, 1 P. Wms. 618; *Coles v. Pilkington*, L. R. 19 Eq. 178; *Kennedy v. Kennedy*, 2 Ala. 590; *Miller v. Cotten*, 5 Ga. 340; *Springle v. Morrison*, 3 Litt. 52; *Glass v. Hulbert*, 102 Mass. 33; *Dodge v. Wellman*, 1 Abb. N.Y. App. Dec. 515; *Townesley v. Moore*, 30 Ohio (Comm.) 185. See 1 Eq. Ca Ab. 29, pl. 5; Woodesson Lect. *258 (citing Puffendorff); Batt. on Contr. L. L. vol. 67) *81 *et seq.*; Story Eq. § 1522; Bisp. Eq. (2d ed.) § 258, page 318; Bigel. on Equity, 177-8; Gresly, Eq. Ev. 207; Whart. Ev. § 909; Greenl. Ev., 13th ed., § 266, n. s.; Parson Contr. III. *397; Bigel. on Fraud, 385; Kerr on Fraud, &c., *passim*.

(t) *McCormick v. Grogan*, L. R. 4 H. L. C. 97.

(u) *Bloomstein v. Clees*, 3 Tenn. Ch. 439, saying that there is a long line of

"where there is any fraud this court interferes."(v) As to fraud working an estoppel, see *supra*.

§ 476. The following are some examples of the effect of fraud, &c., as making an exception to the Statute of Frauds.
Examples of the effect of fraud. A sale of immovables can in Louisiana be rescinded

on oral evidence of fraud.(w) To an action of fraud for the sale of land represented to be other than that for which the deed was afterwards given, the Statute of Frauds cannot be set up.(x) Where the defendant procured a written contract of sale of land under certain oral stipulations by which a previous vendee, the plaintiff, assigned his right to the defendant, a refusal to carry out these oral conditions will lead a court of equity to rescind the later transaction in order to allow the plaintiff and the vendor to carry out the earlier sale.(y) A bill asked to have a deed set aside for fraud, and that a certain promise by the vendee be performed, and as to this promise asked discovery; and the defendant denied the fraud and the promise, and gave no discovery, and relied on the Statute of Frauds. The Vice-Chancellor thought the plea bad.(z)

A decision in one of the earlier Rhode Island reports illustrates the application of the doctrine of fraud in cases within the Statute of Frauds; and while the memoranda in the case were perhaps sufficient, and though there was probably adequate equitable part performance, the judgment was rested on the ground of fraud. The facts were that the defendant, a vendee of a building which had been let by the vendor to the plaintiff, signed an agreement of purchase in which a lease of the building was referred to but not described. The defendant gave bonds for the performance of his agreement, took a deed which expressed the conveyance to be subject to the parol contract of lease, and gave the lessees a memorandum of lease sufficient under the Statute of Frauds to subject him to an action of damages for the breach of it. The court, without deciding whether the latter memorandum with the conveyance to

English and American cases of estoppel resting on this ground.

(v) Child v. Comber, 3 Swanst. 426.

(w) Thomas v. Kennedy, 24 La. Ann. 210.

(z) Ochsenkehle v. Jeffers, 32 Mich. 482.

(y) Jervis v. Berridge, L. R. 8 Ch. App. 359.

(x) Wright v. Henderson, U. C. Jur. 304.

the vendee satisfied the statute, or deciding whether, under the evidence, possession taken by the lessees and expenditures upon the property made by them were part performance to take the case out of the statute, but saying that the lessees had a right of action under the memorandum against the vendor, and that the breach of the contract as to the lease was a fraud by the vendee upon the vendor so as to allow the latter to recover on the bond, held that on other grounds, to avoid circuity of action, a bill for specific performance lay by the lessees against the vendee.^(a) As to the fraud involved in making false representations as to property to be given by the promisor, under which the promisee is induced to marry. See "Marriage."^(b)

The fraud which consists in a breach of trust as distinguished from a breach of contract is so fully discussed elsewhere in this book that it need only be alluded to here. See "Trusts."

§ 477. There are some instances in which fraud has not been sufficient to do away with the Statute of Frauds. Thus, where a vendor verbally sells land to one and afterwards by writing to another without notice, who pays a part of the price, and afterwards conveys to the first vendee, the second vendee cannot have specific performance, but is left to his remedy at law; the oral agreement was void,^(c) and in North Carolina it has been held that a parol vendee cannot sustain a bill for specific performance on the ground that the defendant by fraudulent representations induced the vendor to convey to him, the defendant.^(d) The proof of fraud must be clearly made out.^(e) Where the law requires a writing, Brett, J., said that it was to be presumed that the party to be affected by it had read it.^(f)

Example of fraud insufficient to do away with the statute.

§ 478. The refusal to perform an oral contract in reliance upon the protection of the Statute of Frauds is not such fraud as will

(a) *Hodges v. Howard*, 5 Rhode Isl. and, 149. (N. Car.) 232; see *Dung v. Parker*, 52 N. Y. 496.

(b) *Denham v. Taylor*, 29 Ga. 176; (c) *Hendry v. English*, 18 Grant, 122; see *Tague v. Fowler*, 4 Cent. L. J. 598 (S. C. Ind.); *Smith v. Palmer*, 1 Chan. Cas. 134.

(c) *Patterson v. Martz*, 8 Watts, 379; see *Archbold v. Lord Howth*, 1 Ir. Rep. C. L. 619; 18 Ir. Jur. 88.

(d) *Lea v. McKenzie*, 3 Jones, Eq. 1 C. P. D. 618. (f) *Parker v. South Eastern R. R.*

make an exception to the statute,^(g) nor does the reliance of the promisee upon the promise make any difference.^(h) The equity must not arise from the contract, but from the fraudulent act of the party.⁽ⁱ⁾ That the promisee, relying upon the other's honor, fails to have the contract put into writing, is deceived, is not, without more, a reason for creating an exception to the Statute of Frauds.^(j) A promise to hold land in trust is equally within the statute, and the breach of the express trust is not such fraud as will give rise to an implied trust.^(k)

Where a deed having conveyed just what the parties intended, a parol agreement that there should be a subsequent deed for the remainder of an entire tract sold by parol, was an independent contract, to which the Statute of Frauds applied, and of which the deed was not part performance. The fraud which arises only from the breach of the oral contract does not make the oral evidence admissible.^(l) Where the complainant, a mortgagor of land, requested the trustee appointed to sell under the mortgage to carry out a sale which the former had made to the defendant, and the trustee conveyed to the defendant, it was held that the complainant could not show orally that there was a verbal agreement between the complainant and the defendant that the latter should really have only part of the property; the breach of an oral contract^(m) not being such fraud as will take the case out of the statute. Where the fraudulent representations relied on are not false statements as to an existing fact, but merely a promise by the defendant that at a future day he would grant a certain easement which would

(g) *Montacute v. Maxwell*, 1 P. Wms. 618; *Hall v. Rowley*, 2 Root, 163; *Irwin v. Hubbard*, 49 Ind. 354; *Bauduc v. Conrey*, 10 Robins. 471, citing Louisiana cases; *Boyd v. Stone*, 11 Mass. 346; *Ahrend v. Odiome*, 118 Mass. 268; *Evans v. Folsom*, 5 Minn. 428; *Burnham v. Porter*, 24 N. H. 580; *Streator v. Jones*, 3 Hawks, 434; *Hackney v. Hackney*, 8 Humph. 455; *Box v. Stanford*, 13 Sm. & M. 93.

(h) *Parsons v. Walter*, in note to *Peckham v. Faria*, 3 Doug. 14, note; *Wilton v. Harwood*, 23 Me. 134; *Bright-*

man v. Hicks, 108 Mass. 247; *Hayes v. Burkam*, 51 Ind. 136.

(i) *Springle v. Morrison*, 3 Litt. 53.

(j) *Montacute v. Maxwell*, 1 P. Wms. 618; as to invalidity of oral promise to put the contract into writing, see *Leake v. Morris*, 1 Dick. Ch. 14.

(k) *Morley v. Davison*, 20 Grant, 101; *Lamborn v. Watson*, 6 Har. & Johns. 255.

(l) *Broughton v. Coffey*, 18 Gratt. 197.

(m) *Wilson v. Watts*, 9 Md. 461; *Eccleston, J.*, dissenting, and citing many cases for his view.

benefit the plaintiff's estate the statute applies; and this though the plaintiff relied on the representations.(n)

That the plaintiff parts with his money relying upon an oral guaranty does not take the latter out of the statute on the ground of part performance.(o) So the fact that the plaintiff was induced to become one of the stockholders by the defendant's promise that he would at some future time buy the stock of the plaintiff at a specific price, does not change the essential character of the transaction; and the Statute of Frauds still applies.(p) An action for fraud or deceit will not lie any more than any other action for the breach of an oral contract within the Statute of Frauds.(q)

§ 479. According to the tendency of modern decisions, mistake or even fraud in not putting the contract in writing will not create an exception to the Statute of Frauds.(r) There is a current of decision which regards the failure to put the contract in writing as such fraud as will in some instances make an exception to the Statute of Frauds. Fraud or mistake in not putting the contract into writing.

That one of the parties by fraud prevented the memorandum being made was a feature in some early English cases where oral representations under which a marriage was had were upheld, but this reasoning was probably only of corroborative effect in bringing about a decision which would have been made on the other fraud in the matter.(s) There are some American authorities which say that fraud in preventing the memorandum being made will take the case out of the Statute.(t) Refusing to make the memorandum is not the same thing as actively preventing a memorandum being made, which would otherwise have been executed, and in an extreme case the latter act might work an exception to the Statute of Frauds; how the former ever can it is difficult to see. In a late

(n) *Richter v. Irwin*, 28 Ind. 27; see, however, *Maxwell v. East River Bank*, 3 Bosw. 146.

(o) *Daniel v. Mercer*, 63 Ga. 442.

(p) *Boardman v. Cutler*, 128 Mass. 390.

(q) *Archbold v. Howth* (Lord), 1 Ir. Rep. C. L. 619; 18 Ir. Jur. 88; see "Frauds."

(r) *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Wilson v. Ray*, 13 Ind. 1; *Glass v. Hulbert*, 102 Mass. 33; *Gilbert v. Trustees of East Newark*, 1 Beas. Ch. 181;

Streator v. Jones, 3 Hawks, 434; *Bozza v. Rowe*, 80 Ill. 198; *Box v. Stanford*, 1 Sm. & M. 93 (though there is also part performance, the latter doctrine not obtaining in Mississippi).

(s) *Montacute v. Maxwell*, 1 P. Wms. 618; see "Marriage."

(t) *Hackney v. Hackney*, 8 Humph. 455; *Wesley v. Thomas*, 6 Harr. & Johns. 26; *Chambers v. Lecompte*, 9 Mo. 577; see *Mather v. Scoles*, 35 Ind. 3.

Missouri case, however, it was said that a fraudulent refusal to comply with an oral promise to put into writing a contract within the Statute of Frauds, makes, *semble*, an exception to the latter; the promise, *semble*, must have been not to do the act which was the subject of the contract, but expressly to make the writing.(u)

§ 480. As in every other branch of the law of the Statute of Frauds, so in this, the effect of equitable part performance is to pave the way for the admission of oral proof. Where there has been a fraudulent breach of the contract by one party and part performance by the other, the Statute does not apply.(v) Fraud or mistake in not putting the contract in writing, if there is also part performance, will create an exception to the Statute of Frauds.(w) Where G., the defendant's ancestor and testator, induced the plaintiff to become his housekeeper and nurse by promising her certain property, and upon her declining to remain with him till he did so, he made his will, devising the property in question. The plaintiff then fulfilled her part of the contract, but G. revoked the will by a subsequent codicil. It was held that B. could recover notwithstanding the Statute of Frauds.(x)

Where the defendants being insolvent obtain possession of goods on which they had orally agreed to give a chattel mortgage to secure the installments of the price, the Statute of Frauds does not apply, though the last of these installments was not due for fourteen

(u) *Wooldridge v. Scott*, 69 Mo. 673, citing *Halfpenny v. Ballet* (see chapter on "Marriage"); *Chambers v. Le-compte*.

(v) *Hidden v. Jordan*, 21 Cal. 92.

(w) *Bozza v. Rowe*, 30 Ill. 198. Where the plaintiff agreed to sell certain land to the defendant, but did not put the contract in writing because this land had by mistake been included in a deed from the plaintiff to C., and the plaintiff delivered the possession to the defendants under the oral contract, and they used, occupied, and improved the land; and plaintiff procured C. to disclaim all title to the land; and the defendants then claimed the land as theirs, by possession and improvement, and re-

fused to pay the plaintiff for the same; it was held that the latter was entitled to recover under the oral contract the price agreed on for the land, though in argument the Statute of Frauds was earnestly insisted on; *Maxfield v. Bierbauer*, 8 Minn. 416.

(x) *Loffus v. Maw*, 3 Giff. 603; *Jordan v. Money* was much criticised by *Stuart, V. C.*, and said to be inconsistent with *Hamersley v. DeBiel* in holding that a representation as to intention did not bind. [In *Jordan v. Money* the effect of the representation in inducing the marriage was not clear; in *Loffus v. Maw* there could be no question as to the services being rendered in consideration of the promised devise.]

months, because the conduct of the defendants was fraud in fact.(y) There is some authority to the effect even where there is part performance, that fraud or mistake in not making the memorandum will not give rise to an exception to the Statute of Frauds.(z)

§ 481. Where the fraud amounts to an estoppel the Statute of Frauds does not apply,(a) as where the party setting up the oral contract has made a change in his situation.(b) Estoppel.

Part performance may work an estoppel.(c) The proof of fraud in the case of estoppel must be fully made out by the party seeking on that ground to take the case out of the Statute of Frauds.(d) The following are examples of sufficient estoppel: Thus, the not infrequent case of a claimant to land suffering another to improve the property without disclaiming, the claimant being estopped from afterwards setting up his title; and the Statute of Frauds does not apply.(e) Where a vendee of land sold without timber has agreed by parol, when he took his deed, that he would convey the timber to a purchaser of such timber, he is estopped to claim the latter.(f)

Where A., in a negotiation relating to the lease of land, in order to induce B. to make the contract, represented that it was impossible for him, A., to do certain acts which might interfere with B.'s enjoyment of the leasehold property, and though this was true at the time, A. managed to get it into his power to interfere with the use of the land which B. had in the meanwhile leased; it was held that, though there was no covenant, yet that on the ground of fraud

(y) *Tiernan v. Granger*, 65 Ill. 354. Doctrine that if the defendant had agreed to accept the draft in suit, which was for the price of an engine delivered to W., then there would have been such part performance as would have made it a fraud for defendants to set up the Statute of Frauds. The draft was drawn by W.; *Saulsbury v. Blandy*, 53 Ga. 667.

(z) *Box v. Stanford*, 13 Sm. & M. 93; in Mississippi the doctrine of part performance does not prevail.

(a) *Hall v. Rowley*, 2 Root, 163; *Anon.*, 5 Vin. Ab. 523, pl. 40; *Glass v. Hulbert*, 102 Mass. 24; *Bloomstein v. Clees*, 3 Tenn. Ch. 439; see *Townsend &c. Bank v. Todd*, 47 Conn. 190; *Patton v. McClure*, Mart. & Yerg. Rep. 338, admitting that an extreme case of estoppel is not within the statute; see 2 Amer. Lead. Cas. 5th ed. 578; Whart. on Evid. 1st ed., § 1148.

(b) *Glass v. Hulbert*, 102 Mass. 24, citing cases.

(c) *Simonton v. Liverpool &c. Co.*, 51 Ga. 80.

(d) *Hendry v. English*, 18 Grant, 122.

(e) See *Bloomstein v. Clees*, 3 Tenn. Ch. 439; *Brown v. Bowen*, 30 N. Y. 541; *Bigelow v. Foss*, 59 Me. 164; *Junction R. R. v. Harpold*, 19 Ind. 350; *Vicksburg R. R. v. Ragsdale*, 54 Miss. 215; *Springle v. Morrison*, 3 Litt. 53; see *Zimmerman v. Wengert*, 31 Pa. St. 401; *Wengert v. Maulfare*, 1 Pears. 492.

(f) *Carpenter v. Ottley*, 2 Lans. 458.

and estoppel, and on that of B.'s part performance, A.'s promise or representation must be carried out as made.(g) A boundary line run, under representation from the true owner and acted upon afterwards, works an estoppel,(h) especially when valuable improvements are made in reliance upon the line so run.(i) Where one of two vendors only signed the memorandum of sale, declaring that the signature of the other was unnecessary, and the latter made the same remark, adding that he had parted with his interest in the land, he is estopped to dispute the title founded on this contract of sale.(j) Where a mortgagee stands by and allows a marriage settlement to be made without disclosing the mortgage, he is estopped, and will be ordered in equity to assign the mortgage to the uses of the settlement.(k) Where a parent, having an interest in the property of her son, represented in a marriage treaty the property to be the son's, she could not enforce a bond the son had given her for her interest in the property.(l) Where one grants a general right and warrants it, the fact that his title to the right was subject to revocation by a third person as a mere oral license, and that he the grantor purchases this right to revoke, has no effect; he cannot as against his warranty exercise the revocation.(m)

§ 482. The following are some examples of conduct regarded as not constituting an estoppel.

Examples of insufficient estoppel. The mere fact that a promise has been acted upon by the promisee will not work an estoppel.(n) It has been expressly said in several instances that an oral estoppel will not transfer the legal title in land.(o)

Where a statute requires a special form of conveyance in order to protect such rights, as, for example, those of a married woman, an estoppel will not be sustained as against the express law.(p)

A parol declaration of gift will not without more give rise to an

(g) *Piggott v. Stratton*, 1 DeG. F. & J. 49; *Johns*, 357, distinguishing *Jordan v. Money* on the ground that there the House of Lords thought that all that was proved was a *present* intention not to do an act, that was relied on.

(h) *Spears v. Walker*, 1 Head, 168.

(i) *Corkhill v. Landers*, 44 Barb. 227, citing cases; see "Land."

(j) *Dickson v. Green*, 24 Miss. 614.

(k) *Berrisford v. Milward*, 2 Atk. 49.

(l) *Scott v. Scott*, 1 Cox Ch. 366.

(m) *Dean v. Colt*, 99 Mass. 485.

(n) *Brightman v. Hicks*, 108 Mass. 247.

(o) *Barker v. Bell*, 37 Ala. 359, citing cases; *Pool v. Lewis*, 41 Ga. 170.

(p) *Littlejohn v. Egerton*, 76 N. Car. 470; *Towles v. Fisher*, 77 N. Car. 440

Oglesby Coal Co. v. Pasco, 79 Ill. 164.

estoppel.(q) In a case where there was held to be no estoppel, the court said: "Mere words, however often uttered, do not convey an interest in land or extinguish a legal right thereto, unless when another, acting upon the representations, has been induced to part with something of value, or assumed obligations, and it would be a fraud upon him to allow the party afterwards to assert a claim or title to his injury. Such is not the present case."(r)

Where the evidence shows that the oral contract was in fraud of creditors, the latter cannot on grounds of public policy be proved, especially as against a deed or writing.(s) As to the mode of pleading when relief is sought against fraud, see chapter on Pleading.

§ 483. There is a second great division of the question as to the effect of fraud or mistake in making exceptions to the Statute of Frauds. It is that which deals with fraud or mistake as a reason for varying a written instrument, required by the Statute of Frauds. To exhaust this subject would require a separate treatise; and indeed much of the law involved turns rather upon the infringement of the common-law rule forbidding the admission of oral evidence to contradict a writing, than upon points peculiar to the Statute of Frauds.(t)

Fraud or mistake as a ground for allowing oral variance of a writing.

It may be said, subject to modification and exceptions, that as a general rule a writing, though one essential to the proof of the contract and required by the Statute of Frauds, can be varied or contradicted upon evidence of fraud or even of mistake.(u) Courts of equity have even added a term to a deed on oral evidence, and decreed its enforcement on the ground of fraud.(v) In Georgia, by statute the admissibility of such evidence to affect a deed or writing is confined to the case of fraud.(w)

(q) *Connor v. Tranick*, 37 Ala. 295.

(r) *Melvin v. Bullard*, 82 N. Car. 39.

(s) *Bryant v. Mansfield*, 22 Me. 360.

(t) See *Clowes v. Higginson*, 1 V. & B. 525.

(u) *Stoutenburgh v. Tompkins*, 1 Stockt. 336; *Wesley v. Thomas*, 6 H. & Johns. 26. See an elaborate opinion in *Towner v. Lucas*, 13 Gratt. 705, on the general subject. See *James v. Cutler*, 10 No. West. Rep. 147; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 48; 2 Lead. Cas. in Eq. (4th Am. ed.)

1002 *et seq.*, setting up a distinction between executed and executory contracts, and holding that it is only in the former that any wrong needing redress has occurred, 8 Law Rev. vol. 8, 1st Series, 330; *Adams Eq.* 6th Am. ed. 171; *Bisp. Eq.* See Index "Fraud." As to cases of mistake, see *Bellows v. Stone*, 14 N. H. 201; *Grant v. Levan*, 4 Pa. St. 393.

(v) *Phyfe v. Wardell*, 2 Edw. Ch. 47. See *infra*.

(w) Statutes 1837; *Durham v. Taylor*,

The party to an agreement within the Statute of Frauds, who has not signed the memorandum, but who under it is bound by certain stipulations, if ready to perform the latter may have the writing reformed upon proper ground shown.(x) The Statute of Frauds does not interfere with the reformation by chancery of a deed on the ground of fraud, mistake, &c.(y) There is a remedy in equity in the case of an oral warranty of the acreage of land when fraud or mistake can be shown.(z) Where the vendor received a mortgage for the price of land, which did not express the contract, it will be corrected notwithstanding the Statute of Frauds, *semble*, if there is mutual mistake or fraud.(a)

In a case in the Supreme Court of Pennsylvania it was said that a deed could be reformed for fraud or mistake, and that "In the first place, the Statute of Frauds and Perjuries would not stand in the way, for, although the effect would be to pass an estate by parol, yet the statute must be so construed as to prevent frauds, and not to promote them. And this would apply where mistake and not fraud was the ground of the relief sought; for, though a mistake does not necessarily include a fraud, yet to set up and use a written instrument for a different purpose from that for which it was made, would be as inequitable as to take advantage of an instrument fraudulently obtained. But the chancellor would have to be satisfied that the mistake was on both sides; for, if it be by one party only, the altered instrument will not express the intention of both. A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific execution, but it can not be a ground for altering its terms;" and the court added that "The evidence must be equal to that of the deed; and the presumption that in the latter were merged all previous contracts must be overcome."(b)

In a late Kansas case the court, referring to the point of the

29 Ga. 176; but before that date mistake was sufficient, *Wyche v. Green*, 11 Ga. 187, *semble secus* when the mistake is denied; *Wall v. Arrington*, 13 Ga. 88.

(x) *Thompson v. Marshall*, 36 Ala. 513.

(y) *Blackburn v. Randolph*, 33 Ark.

126; *Simmons v. North*, 3 Sm. & M. 72.

(z) *Cabot v. Christie*, 42 Vt. 125.

(a) *Rider v. Powell*, 4 Abb. App.

Dec. 63, citing *Moale v. Buchanan*, *Gillespie v. Moon*, *Keisselbrack v. Livingston*. The reporter (Abbott) says that the true ground of this decision is given in *Nevius v. Dunlap*, 33 N. Y. 676; *Story v. Conger*, 36 N. Y. 673.

(b) *Schettiger v. Hopple*, 3 Grant (Pa.), 57, citing *Gillespie v. Moon*.

Statute of Frauds, said: "The argument is elaborated by counsel, and many authorities are cited. But these authorities run along the line of the doctrine of specific performance; while the case at bar comes under the head of the reformation of contracts. The difference between the two is marked and substantial. One aims to enforce a parol contract as though it were in writing; the other seeks simply to conform the written to the real contract. One would avoid the necessity of any writing; the other would simply correct the writing. The principles which control the one are essentially different from those which control the other. If a parol contract were sought to be enforced, the arguments and authorities of counsel would be in point. But the reformation of a deed already made, the correction of a contract already in writing, involve very different considerations. The question is not whether there has been such a performance as renders inequitable the non-enforcement of the parol contract, but whether the written is the actual contract. It is not the substituting of acts *in pais* for the written contract, but it is making the written the expression of the real contract. It would undervalue the whole doctrine of reformation of contracts and deeds if the case were to be treated as though no written contract had ever been made. The reformation implies the existence of a written contract. It corrects that which exists, and does not seek to avoid the necessity of that which is not. A mutual mistake must be shown, and that the party would be wronged by a failure to correct. These facts appearing, the power and duty of a court of chancery to reform is clear." (c)

When a mistake in a deed is admitted it will be corrected. (d)

§ 484. The Statute of Frauds is certainly an obstacle to some extent in the way of the reformation of a writing. Thus it has been said that equity, within the range allowed by the statute, will endeavor to correct defective contracts. (e) Where the mistake is denied and the Statute of Frauds applies, a court may refuse its aid. (f)

How far the Statute of Frauds prevents such variance. *Glass v. Hulbert*.

Glass v. Hulbert, reported in 102 Massachusetts, (g) contains per-

(c) *Conway v. Gore*, 24 Kan. 391; (e) *Aldridge v. Weems*, 2 G. & Johns. see to the same effect *McKenna v. 47.*

Johnston, 60 Ill. 311.

(f) *Wall v. Arrington*, 12 Ga. 88.

(d) *Smith v. Greeley*, 14 N. H. 378; (g) Page 33.
even as against a decedent.

haps the most finished exposition of the law of the Statute of Frauds as affected by the doctrine of equitable relief. The court said: "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds; or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the Statute of Frauds can be met by some ground of estoppel to deprive the party of his right to set up that defence."^(h) The court continued: "Fraud which relates only to the preparation, form, and execution of the writing is sufficient to vitiate the instrument so made; it may be set aside either in equity or at law. If it is made to include land not the subject of the actual sale, it is inoperative as to such land; and the fraud may be shown for the purpose of defeating its recovery, in an action at law. *Walker v. Swasey*, 2 Allen, 312, and 4 Allen, 527; *Bartlett v. Drake*, 100 Mass. 174. It has been questioned whether any other effect can be given to such fraud than to defeat the operation of the instrument altogether; and whether a court of equity can reform it by giving it a narrow operation, as modified by parol proof, in a case within the Statute of Frauds. *Attorney-General v. Sitwell*, 1 Y. & Col. Exch. 559. The difficulty is that, if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by oral evidence; and this seems to violate the statute. But the instrument in such a case is not void. It is voidable only, and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct; and it is not for him to object that the fraud is availed of only to defeat the rights which he has secured by fraud, beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess or the clause improperly inserted.

(h) Citing *Jordan v. Sawkins*, 1 Ves. 63; *Clinan v. Cooke*, 1 Sch. & Lefroy, Jr. 402; *Osborn v. Phelps*, 19 Conn. 22.

Parol testimony, used to defeat a title or limit an interest acquired under a written instrument, or to convert it into a trust, does not necessarily conflict with the Statute of Frauds."

In later sections (§ 497, § 501) it will be seen how far a plaintiff in equity can avail himself of oral evidence in a matter within the Statute of Frauds.

§ 485. The following are some examples of the application of the doctrine under discussion.

A stipulation purely personal can be enforced on oral evidence, though not contained in a deed relating to the subject.(i) Examples.

A court of equity will correct the mistake under which a will instead of a deed was executed to fulfill an oral ante-nuptial contract; the will at law being revoked by the subsequent marriage.(j) A parol agreement to pay separately for an equitable title of the vendors is good when the vendors have given and the vendees have accepted a deed for the land; though the deed recited the receipt of a smaller sum.(k) *Seem*, where a parol stipulation by the vendor that the deed shall reserve certain rights in favor of a third person who claims under a parol contract void by the Statute of Frauds, is omitted by mistake, that the vendor only can have this mistake corrected.(l)

Where a scrivener left a term out of a deed, the mistake was corrected in a Connecticut case, and specific performance decreed.(m)

Where the owner of mortgaged land sold it at auction to one who sold his bid to the defendant, and the latter took a deed covenanting against all claims except the mortgage, oral evidence that the defendant should pay the mortgage was admitted.(n)

Where, in consideration of a sale of land evidenced by an imperfect memorandum, the grantee gives a mortgage on other land, the memorandum might, *seem*, be corrected as upon proof of fraud or mistake.(o) Mistake in an award under a partition may be corrected on oral evidence, and specific performance be decreed.(p)

(i) *Weld v. Nichols*, 17 Pick. 538.

(m) *Wooden v. Haviland*, 18 Conn.

(j) *Lant's Appeal*, 13 Chic. Leg. 101; see also *Blodget v. Hobart*, 18 Vt. News, 61 (S. C. Pa.) See *Shaw v. Jake-* 414.
man, 4 East, 201.

(n) *Fiske v. McGregory*, 34 N. H. 414.

(k) *Pierce v. Weymouth*, 45 Me. 482.

(o) *Stowell v. Haslett*, 5 Lans. 385.

(l) *Young v. Miller*, 10 Ohio, 85.

(p) *Craig v. Kittredge*, 3 Foster, 231.

A mistake in a written memorandum mortgaging three leasehold houses whereby the date of two leases is erroneously given, can be rectified, and the Statute of Frauds has nothing to do with the case.(q)

Where a vendor of land took a bond and mortgage for the price, oral evidence in a suit on the bond was, on the ground of fraud, admitted to show that it was agreed that there should be personal liability in the vendee; that the vendor should look to the land; that the vendee, within a certain time, should have the right to give back the land; that the vendee wanted this inserted in the bond, but the vendor said that this was not necessary; that within the time, the vendee offered to give back the land, and the vendor said that he had parted with the bond and mortgage, but would obtain these, and that then he would take the land back.(r)

On the ground of fraud a memorandum may be shown to be merely preliminary, and never to have been intended as evidence of the contract.(s)

§ 486. Where there has been part performance mistake may be corrected upon oral evidence, though there is a writing.(t) A special weight is given to oral representation upon which a contract has been entered into; see § 491 and § 484. Thus where a memorandum is executed with a mistake in it on the assurance of the other party, that it will be rectified, equity will relieve.(u) Oral evidence of representations, made at the time of the execution of a written contract for the sale of land, is good as a defence to specific performance.(v)

Parol evidence of representations made at time of execution of a written contract for sale of lands is admissible as a defence to specific performance.(w) Oral evidence of conversations at or be-

(q) Boulter (*In re*), 4 Ch. Div. 245.

(r) Greenawalt v. Kohne, 4 W. N. Cas. 497; 85 Pa. St. 369.

(s) Rogers v. Hadley, 2 H. & C., 247.

(t) Moale v. Buchanan, 11 G. & Johns. 325; Blunt v. Tomlin, 27 Ill. 93; Keisselbrack v. Livingston, 4 Johns. Ch. 147; Wentworth v. Buhler, 3 E. D. Smith, 305; see, however, Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273;

Annan v. Merritt, 13 Conn. 479; Tilton

v. Tilton, 9 N. H. 385; Jervis v. Ber-
ridge, 42 L. J. Chanc. 518; Snelling v.

Thomas, L. R. 17 Eq. 311; Howell v.
Gibson, 30 Miss. 464.

(u) Cogger v. M'Gee, 2 Bibb, 323.

(v) Miller v. Chetwood, 1 Green, Ch.
207; Mitchell v. King, 77 Ill. 466.

(w) Miller v. Chetwood, citing many

fore the execution of a written contract are admissible in defence to an action for specific performance.(x) Where lessees sub-let at a rental at the rate of a half of the principal rent, and represented this rent to be greater than it was, the sub-lease was corrected, and the Statute of Frauds held not to apply.(y) To an action for fraud in the sale of land, represented to be other than that for which the deed was given, the Statute of Frauds cannot be set up.(z) Or when a deed was represented as conveying certain land, which was not in fact included therein.(a)

Where the former owner of lands sold for taxes offered to redeem and the vendee promised to close with the former's terms, and the owner then, relying upon such promises, let the time of redemption go by, it was held that it was fraud upon the original owner for the vendee to refuse to reconvey, and specific proformance was allowed notwithstanding the Statute of Frauds.(b)

A common case of mistake or fraud for which equitable relief is sought is that where, owing to misrepresentation or mistake, a conveyance does not convey the amount of land agreed upon. This question, as to which there is a great divergency of opinion, will be considered in § 498, § 501.

The following are some cases in which the reliance upon a representation or other mistake was not considered sufficient to take the contract out of the Statute of Frauds.

Where the printed conditions of sale of timber did not state the quantity, and the auctioneer verbally represented a certain quantity to be on the land, the latter engagement could not be proved by parol evidence; the action was at law.(c) Where there was a declaration alleging a promise by the vendor that if the land sold fell short of a certain quantity he would satisfy the deficiency; it was held on special demurrer to be within the Statute of Frauds, and plaintiff by joining in the demurrer admitted that the contract was verbal.(d)

Parol evidence to show that the sum stipulated for in a marriage

cases; *Mitchell v. King*, 77 Ill. 466 (mere concealment may be enough).

(x) *King v. Ruckman*, 6 C. E. Green, 605.

(y) *Kirtland v. Schanck*, 61 Barb. 355.

(z) *Ochsenkehl v. Jeffers*, 32 Mich. 482.

(a) *McAboy v. Johns*, 70 Pa. St. 9.

(b) *Laing v. McKee*, 13 Mich. 124.

(c) *Powell v. Edmunds*, 12 East, 10.

(d) *Bradley v. Blodget, Kirby*, 24.

bond under seal was not correct but for a lesser amount, is contrary to the Statute of Frauds.(e)

Mistake in describing a lot of land as being in a certain locality while part of it was in an adjoining one, cannot be proved by parol so as to lay ground for specific performance.(f)

An action will not lie to recover the value of land upon oral evidence that the consideration was the conveyance of the land to a third person, the deed having recited a money consideration.(g)

§ 487. The weight of authority, in spite of or consistently with what has been already said, is probably that the omission of a term from a writing, though done by fraud or mistake, will not, without more, allow oral proof of the contract,(h) unless there be an estoppel arising from a change in his situation made by the party setting up the oral contract,(i) and it has been held that mistake in the substance of a written contract will not be corrected on oral evidence,(j) nor that a term can be added to or taken away from a deed on oral evidence.(k) A bond will not be reformed for mistake so as to hold a surety.(l)

The principles which are to determine this question are tested best by the consideration of the point as to whether or not the rule of admission of oral proof on the ground of fraud or mistake is merely a weapon of defence, or whether chancery, upon oral proof, will correct the mistake or fraud, and decree the contract as reformed. Much of the contradiction which is to be found in the decisions may be reconciled by observing this distinction; and of those which still conflict many will be those in which the oral evidence was admitted because there was estoppel or part performance. As a general rule it may be said that oral evidence of fraud or mistake will not be admitted on behalf of a plaintiff seeking specific enforcement of the contract as established by the oral evidence.(m)

(e) *Pitcairn v. Ogbourne*, 2 Ves. Sr. 376, distinguishing *Legal v. Miller* as a case of subsequent discharge. (j) *McMurphy v. Garland*, 47 N. H. 322.

(f) *Elder v. Elder*, 1 Fairf. 80. (k) *Howe v. Walker*, 4 Gray, 318.

(g) *Griswold v. Messenger*, 6 Pick. 517. (l) *Trustees v. Otis*, 1 Monthly Jour. 337 (S. C. Ill.)

(m) *Woollam v. Hearn*, 7 Ves. 211;

(h) *Glass v. Hulbert*, 102 Mass. 24; L. C. in Eq. (4th Am. ed.), p. 484, p.

Way v. Cutting, 17 N. H. 451. 920; *Townshend v. Stangroom*, 6 Ves.

(i) *Id.*; *Lloyd v. Inglis*, 1 Des. 340. 328; *Clinan v. Cooke*, 1 Sch. & Lef.

Lord Cottenham said it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for.⁽ⁿ⁾

In a Michigan case it was said that while the American cases may go further than the English in striking a term out of a writing, they will not add.^(o) As a defence oral evidence of fraud or mistake is sufficient, as will be seen. (Chapter on Defence).^(p) Oral evidence is admissible to show that a deed of land was accepted on the condition that the latter should amount to a given number of acres; the suit was on a bond for the purchase-money, and the oral agreement was the ground of defence.^(q) And oral evidence of a contract within the Statute of Frauds is not admissible on behalf of the plaintiff to rebut the defence. Thus where a bill was brought to enforce a written sale of land, the defendant defended on the ground that certain premises were omitted from the writing, and the plaintiff offered to show that this omission was by an oral contract, but the defendant objecting, the bill was dismissed.^(r) The distinction between the admission of oral evidence on a defendant's or on a plaintiff's behalf has been stated in a variety of ways. Thus it has been said that oral evidence of surprise or mistake as well as of fraud is admissible as evidence, but

31, doubting Lord Hardwicke's dictum in *Walker v. Walker*; *Price v. Ley*, 32 L. J. Ch. 530; 4 Giff. 235; *Durham v. Taylor*, 29 Ga. 176; *Westbrook v. Harbeson*, 2 McCord, Ch. 115; *Osborne v. Phelps*, 19 Conn. 74; *Park v. Johnson*, 4 Allen, 261; *Churchill v. Rogers*, 3 Mon. 81; see, besides, the notes to *Woollam v. Hearn*; *London R. W. v. Winter*, Cr. & Phill. 61; *Chesnut v. Strong*, 2 Hill Ch. (So. Car.) 146; *Manser v. Back*, 6 Hare, 443; *Pym v. Blackburn*, 3 Ves. Jr. 38, Sumner's note; Bisp. Eq. § 381-2; Story, Eq. § 752-66, p. 161; Sugd. Vend. (page 160-1) *et seq.*; Law Rev. 1st Series, vol. 8, page 330.
⁽ⁿ⁾ *London &c. R. W. v. Winter*, 1 Cr. & Phill. 61, citing several cases.
^(o) *Climer v. Hovey*, 15 Mich. 18.
^(p) *Osborne v. Phelps*, 19 Conn. 74; *Walker v. Walker*, 2 Atk. 100; *Westbrook v. Harbeson*, 2 McCord, Ch. 115; *Garrard v. Grinling*, 2 Swanst. Ch. 248; see *Kine v. Balfe*, 2 Ball & B. 343; *Myers v. Myers*, 25 Pa. St. 100.
^(q) *Frederick v. Campbell*, 13 S. & R. 141; see *Cabot v. Christie*, 42 Vt. 125.
^(r) *Lawson v. Lande*, 1 Dick. 346.

not to show merely a different contract.^(s) Baron Alderson said that to reform an executory written contract and then decree it as reformed would virtually repeal the Statute of Frauds.^(t)

In a Maine case it was said that "It is well settled that parol evidence is admissible on the part of the defendant, upon a bill for the specific performance of a contract. The reason assigned is, that this is a class of cases in which a court of equity will exercise or withhold its power at its discretion, and that it will not interfere in favor of the plaintiff to enforce performance, where a mistake essentially affecting the contract is made to appear."^(u) And citing a number of English cases, the court added: "The doctrine maintained is, that a party seeking the specific performance of an agreement, and proposing to introduce new conditions, or to vary those which appear in a written instrument, will not be permitted to do so by parol testimony. And in a decision, 17 Massachusetts,^(v) Parker, C. J., regards this principle as fully settled by the more recent chancery decisions in England, and that a few cases, bearing a different aspect, have been explained away or overruled by subsequent decisions." So it has been held that oral evidence of mistake cannot be given by a complainant in a suit for specific performance, if the contract is one within the Statute of Frauds.^(v) In a Virginia case it was said that such evidence was rarely admitted on the plaintiff's behalf.^(w)

§ 488. The most elaborate consideration which this subject has received in recent times is to be found in *Glass v. Hulbert*, reported in 102 Mass.^(x) The facts were as follows:

The complainant, a purchaser of land from the defendant, brought his bill in equity to reform a contract and to enforce it as reformed, alleging that he covenanted in his deed

(s) *Clowes v. Higginson*, 1 V. & B. 525.

(t) *Attorney-Gen. v. Sitwell*, 1 Y. & Coll. Exch. 583.

(u) *Elder v. Elder*, 1 Fairf. 86, citing *Joyne v. Stathan*, 3 Atk. 388; *Rich v. Jackson*, 4 Bro. C. C. 514; *Ramsbottom v. Gosden*, 1 Vesey & Beames, 165; *Townshend v. Stangroom*, 6 Vesey, 328, and the cases there cited; *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Vesey, 402; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Wool-*

lam v. Hearn, 7 Vesey, 211, and in *Higginson v. Clowes*, 15 Vesey, 516; and distinguishing and explaining a number of cases.

(v) *Durgh v. Pomeroy*, 17 Mass. 303.

(w) *Osborn v. Phelps*, 19 Conn. 71, distinguishing *Gillespie v. Moon*, as a case where a conveyance passing too much land was corrected.

(x) *Jarrett v. Johnson*, 11 Gratt. 335.

(x) Page 33.

to keep up a certain fence, being induced thereto by a representation that a certain third person, a neighbor, was to keep up another fence bounding the same property; that he, the complainant, having paid in certain bonds, was to be allowed their premium, and that the property conveyed was to have contained more land. It was held that for the misrepresentation as to the fence, and as to the failure to pay over the premium on the bonds, the action should have been at law; and as to the deficit in the amount of the land, the Statute of Frauds having been pleaded and the contract being oral, the complainant could not recover in absence of the estoppel arising from part performance, &c. *Sembla*, that had the complainant offered to reconvey the land, he would, on his own allegation, have had a right to a rescission of the contract and to the restoration of his bonds. The court said that "relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the Statute of Frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not purposely express that agreement. But rectification by making the contract include obligations or subject-matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writing at all." (y) The court continued: "Fraud may vitiate the writing which is tainted by it; but it does not supply that which the statute requires. It may destroy a title or right acquired by its means; but it has no creative force. It will not confer title. In

(y) Citing *Parkhurst v. Van Cortlandt*, 14 Johns. 32, as follows: "Where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing. Per Thompson, C. J. Such

rectification, when the enlarged operation includes that which is within the Statute of Frauds, must be accomplished, if at all, under the head of equity jurisdiction, viz., fraud."

the absence of a legal contract, by the agreement of the parties, it will not establish one nor authorize the court to declare one by its decree." And, "We apprehend that in most instances where fraud, occasioning a failure of written evidence of an agreement or particular stipulation, has been held to take the case out of the Statute of Frauds, there was fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel. In such case the argument is transferred to the simple question of the sufficiency of the additional circumstance for that purpose. The cases most frequently referred to are those arising out of agreements for marriage settlements. Another class of cases are those where a party acquires property by conveyance or devise, secured to himself under the assurance that he will transfer; for the benefit of such person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself. Indeed, the fraud which alone justifies this exercise of equity powers, by relief against the Statute of Frauds, consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute. When a writing has been executed the courts allow the fraud or mistake, by which an omission or defect in the instrument has been occasioned, to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. But the obstacle of the Statute of Frauds to the enforcement of obligations, or the security of rights not expressed in the instrument, remains to be removed in the same manner as if there were no writing. The power to reform the instrument is not an independent power or branch of equity jurisdiction, but only a means of exercising the power of the court under its general jurisdiction in cases of fraud, accident, and mistake. Notwithstanding contrary decisions and *dicta*, we are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the alleged agreement and relying upon the Statute of Frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a

deed as to a direct suit for its specific performance. We are satisfied, also, that this is the rule to be derived from a great preponderance of the authorities.”(z)

§ 489. The following are some examples of the refusal to admit oral evidence of fraud or mistake on behalf of the plaintiff.

Vice-Chancellor Bacon held that, “in the absence of part performance, an oral contract will not be enforced which differs from the written evidence of the same transaction executed by the parties. The attempt here was to introduce by parol a restriction into a contract of leasing by which the value of the lease would have been materially diminished to the lessee.”(a)

Examples of refusal to allow oral variation of writing on plaintiff's behalf.

Where there was no pretence that the deed did not convey what it purported to convey, oral evidence to show a contract by the vendor that the boundary lines should be extended to include more land than the deed included, was rejected as contrary to the Statute of Frauds.(b)

Where a plaintiff in equity, conveying to his vendee's vendee, reserved by a covenant in the deed an indemnity against his liability on a bill of exchange for the price of the property agreed upon in the first sale, and which was recited as drawn by the first vendee in favor of P. and S., but in point of fact was in favor of the plaintiff. It was held that the Statute of Frauds applied; that while available as a defence in equity it was not valid to enable the plaintiff to hold the second vendees on the indemnity.(c)

(z) In regard to *Gillespie v. Moon*, 2 Johns. Ch. 601, the court, in *Glass v. Hulbert*, said: “The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established, 1 Story Eq., § 161. It is quite another propo-

sition to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence, and enforce it. No such proposition was presented by the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the Statute of Frauds.”

(a) *Snelling v. Thomas*, L. R. 17 Eq. 311.

(b) *Churchill v. Rogers*, 3 Mon. 81; see *Nene Valley &c. Commissioners v. Dunkley*, 4 Ch. D. 1.

(c) *Floyd v. Harrison*, 4 Bibb, 77; see generally *Lawrence v. Dole*, 11 Vt. 555; *Lloyd v. Inglis*, 1 Des. 340; *Kirtland v. Schanck*, 61 Barb. 355.

§ 490. As has been said, when there is part performance oral evidence is admissible to show what the contract is, and on the ground of fraud or mistake to correct any writing which evidences the contract, and to enable a court of equity to enforce the contract as corrected.(d) Thus, where the defendant Ann W. Johnson, wife of defendant Joseph S. Johnson, by writing demised, without joinder of her husband, to the plaintiff a certain tract of twenty acres, known as the "Johnson Homestead;" in the lease was an agreement to sell the land. By a verbal agreement between both defendants and plaintiff the property was sold, and Joseph S. Johnson, acting for his wife, conveyed it by deed to the plaintiff by metes and bounds, so as to make just twenty acres; he had previously discovered that the tract leased was really larger, but plaintiff did not discover the mistake till after the deed had been accepted, and brought the action to have the deed reformed. The court held the lease insufficient as a memorandum, owing to the non-joinder of husband (Laws Cal., 1869, ch. 56, § 2), but that there was sufficient part performance to satisfy the Statute of Frauds, and that as there was fraud on one side and mistake on the other, the deed would be reformed.(e)

Reliance upon a written promise may lead to a marriage so clearly that a court of equity may decree performance of the promise, though in itself inadequate under the Statute of Frauds.(f)

The effect of part performance was strongly relied on in a recent New York decision, and where a vendor fraudulently misrepresented the quality of land agreed to be conveyed, the vendee, upon

(d) *Keisselbrack v. Livingston*, 4 Johns. Ch. 147; *Osborn v. Phelps*, 19 Conn. 74; *Bozza v. Rowe*, 30 Ill. 198; *Philpott v. Elliott*, 4 Md. Ch. 273; *Glass v. Hulbert*, 102 Mass. 24; *Climmer v. Hovey*, 15 Mich. 18; *Way v. Cutting*, 17 N. H. 451; *Westbrook v. Harbeson*, 2 McCord, Ch. 115; *Nelson v. Carrington*, 4 Munf. 341.

(e) *Place v. Johnson*, 20 Minn. 220.

(f) *Loxley v. Heath*, 1 DeG. F. & J. 437. Where certain chattels are, from convenience, left out of a wife's marriage

settlement, upon a parol agreement that they shall be treated as if within the settlement, the wife has under the Statute of Frauds no standing as against her husband's marital right to the chattels in question, but *query*, whether if the husband, carrying out the parol agreement by allowing the chattels to remain in the power and disposition of the trustees of the settlement, he can afterwards deny the agreement thus executed; *Simmons v. Simmons*, 12 Jur. 8; 6 Hare, 352.

less being actually conveyed, can have specific performance of the oral agreement to convey the larger quantity; the vendee went into possession of the whole tract.(g)

The distinction made in *Glass v. Hulbert* and denied in *Beardsley v. Duntley*, between a correction by which a vendee seeks to get more than the deed calls for, and that by which a vendor seeks to make him take less, has some authority on its side.(h)

§ 491. There is certainly a class of cases which it is impossible to reconcile with the rule of *Woollam v. Hearn* and *Glass v. Hulbert*; some of these are instances of such gross fraud that an estoppel might well be insisted upon under the least liberal view of equitable reform. Thus where a vendor fraudulently left the description of inclosed land out of a deed and moved the fence, the deed was corrected on oral evidence;(i) or where a mortgagor fraudulently induced a mortgagee to believe that the mortgage covered certain buildings which it did not, the deed was reformed and specific performance decreed.(j) Mistakes in the description of the premises conveyed or mortgaged by a deed are more readily to be corrected on oral testimony than other mistakes.(k)

Examples of oral variation of writing on behalf of plaintiff.

(g) *Beardsley v. Duntley*, 69 N. Y. 582, distinguishing *Glass v. Hulbert* as a case where there was no entry into possession, and as under the Massachusetts statute, which did not provide, as did that of New York, that nothing in it should abridge the power of equity to give specific performance for part performance, and repudiating the distinction between *Gillespie v. Moon* and *Glass v. Hulbert*, set up in the latter case, viz., that the mistake in *Gillespie v. Moon* was in conveying too much, and in *Glass v. Hulbert* in conveying too little; and citing *Smith v. Underdunk*; *Wiswall v. Hall*; *De Peyster v. Hasbrouck*; *Welles v. Yates*, 44 N. Y. 525; *Keiselbrack v. Livingston*, as following *Gillespie v. Moon*.

In *Ruhling v. Hackett*, 1 Nev. 369, it was held that a mortgage will be corrected to be made to include more land as readily as it would be corrected if it

contained too much. *Gillespie v. Moon* considered, and many cases cited.

(h) *Busby v. Littlefield*, 31 Me. 193; *Gillespie v. Moon*, 2 Johns. Ch. 601 (here the vendee had received too much land); *Ex parte National Provincial Bank*, 25 W. R. 101 (here a mortgagor included in the mortgage land in which he had no interest; his assignees in bankruptcy, arguing that the mortgage was incorrect and invalid under the Statute of Frauds, claimed the other properties mortgaged; it was held that the mortgagee might retain its rights as to the properties really belonging to the mortgagor, and intended to be conveyed).

(i) *Flagler v. Pleiss*, 3 Rawle, 345.

(j) *De Peyster v. Hasbrouck*, 1 Ker. 582.

(k) *Morrison v. Collier*, 79 Ind. 421; *Dutch v. Boyd*, 81 Ind. 146.

In a case in West Virginia it was said that "The most important and difficult question involved in this record is: Can a written contract for the sale of land be specifically enforced in a court of equity with a parol variation in the courses of the land agreed to by the parties subsequently and admitted in the answer, which variation in the courses was not made, as admitted by the answer, with a view of modifying the original parol understanding of the parties, which preceded the written contract, but simply to carry out this original parol agreement and understanding, which the written contract failed to do only because of a mutual mistake of the parties as to whether a certain mill site would be included in the boundaries set forth in the written contract. My conclusion is that a court of equity may specifically enforce such contract, though objected to by the defendant in his answer, with such parol variation of the courses and distances. When the mistake is simply in not correctly reducing the original agreement and understanding to writing, the decided weight of the English authorities is against the right of a court of equity to specifically enforce such a contract as modified by parol evidence, so as to correspond with the original parol agreement and understanding.^(l) But even the English judges seem to think that if the mistake in the written contract and the correction to be made is admitted in the answer, it might alter the case.^(m) The decided weight of American authorities in opposition to the English cases is, that the plaintiff may have such mistake corrected and the contract specifically enforced, though the existence of such mistake be denied in the answer. As the object of the Statute of Frauds was to prevent the mischief arising from the resort to parol evidence to prove the existence and terms of an alleged contract in the cases specified in the statute, it would seem that it should be held inapplicable in this case, as the contract and all its terms were as clearly established in this case as if it had been fully set out in the original written contract; and, according to the spirit of the American cases which I have cited, it ought to be specifically executed by a court of equi-

(l) *Creigh v. Boggs*, 19 W. Va. 249, Cr. 459. *Sed vide Martin v. Pycroft*, 2 citing *Rich v. Jackson*, 4 Bro. Rep. 514; *De G. M. & G.* 785.

6 Ves. 335 n.; *Woollam v. Hearn*, 7 Ves. (m) *Id.* See *Attorney-General v. Sitwell*, 1 Y. & C. Exch. 559 and *Martin v. Pycroft*, 22-28; *Squire v. Campbell*, 1 Myl. &

ty.”(n) So in a case not quite so strong as these last, where there was fraud in omitting from the deed part of the land contracted for, the vendor, taking advantage of the vendee’s ignorance of the locality, the vendee on a bill brought had the land so omitted decreed to him.(o)

There are other cases less easy to be defended. Thus it has been unqualifiedly said, that a description in a deed, by which a lot intended to be conveyed is misdescribed, can be corrected on oral evidence notwithstanding the Statute of Frauds,(p) or a term in a written contract relating to the land.(q) So a vendee can recover, it has been held, on an oral warranty as to acreage, for the deficiency, at the contract price per acre.(r) Where it was held that a deed executed under certain circumstances was a sufficient memorandum to satisfy the Statute of Frauds, and the vendee admitted that the price recited in the deed to have been paid was not paid, he was allowed to show that by the terms of the oral contract under which the deed was made the price was payable in installments.(s)

(n) Id.

(o) *Howell v. Gibson*, 30 Miss. 470.(p) *Johnson v. Johnson*, 8 Baxt. 262.(q) *Philpott v. Elliott*, 4 Md. Ch. Dec.273; see generally *Wood v. Patterson*,4 Md. Ch. Dec. 339; *Hall v. Claggett*, 2

Md. Ch. 151.

(r) *Schrivver v. Eckenrode*, 9 W. N. C.162; see generally *Schettiger v. Hop-*ple, 3 Grant (Pa.), 57; *Worley v.*

Tuggle, 4 Bush, 168.

(s) *Gillatley v. White*, 18 Grant (U.

C.), 3.

CHAPTER XXII.

HOW FAR ORAL EVIDENCE UNDER THE STATUTE OF FRAUDS IS AVAILABLE FOR THE PURPOSE OF DEFENCE.

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| <p>§ 492. Oral contract within Statute of Frauds available as defence.</p> <p>§ 493. How far the oral contract not available as defence.</p> <p>§ 494. Modifications of the rule that an oral contract is valid as a defence; admissible to show that memorandum is incorrect; that action has been prematurely brought, &c.</p> <p>§ 495. Express invalid oral contract admissible to rebut an implied one.</p> | <p>§ 496. Oral contract admissible to rebut an equity.</p> <p>§ 497. Oral proof of change in contract subsequent to writing.</p> <p>§ 498. Special application of the rule admitting an invalid express contract to rebut an implied one; services.</p> <p>§ 499. Part performance.</p> <p>§ 500. Amount of evidence required to establish as a defence an oral contract within Statute of Frauds.</p> |
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§ 492. AMONG other respects in which an oral contract within the Statute of Frauds may be available is as a matter of defence in some instances.(a) It has indeed been laid down as a broad proposition that an oral contract being not void, but non-enforceable, is available as a defence;(b) and as examples of this view are the following.

An oral lease for more than a year is a valid defense to a replevin for a chattel taken under a distress for rent.(c) As to the efficacy of an oral license as a defense, see chapter on "Land." Where there was a parol agreement by which executors, with a power of sale, agree with the widow that if she will release her dower, in order to facilitate payment of debts, she shall have certain portions of the land for life on which she was then residing; it was held to bind both heirs and creditors, notwithstanding the Statute of Frauds, and though, *semble*, she could not have recovered the land

(a) *Ford v. Ellingwood*, 3 Metc. (Ky.) 363; *Roberts v. Tennell*, 3 T. B. Mon. 247; *Gray v. Gray*, 2 J. J. Marsh. 23; *Cornellison v. Cornellison*, 1 Bush, 149; *Whipple v. Parker*, 29 Mich. 371; *Lawrence v. Errington*, 21 Grant, 261.

(b) *Gudgell v. Duvall*, 4 J. J. Marsh. 230, citing cases; and see authorities just cited; *Kenny v. Marsh*, 2 A. K. Marsh. 49.

(c) *Roberts v. Tennell*, 3 T. B. Mon. 251.

in an action, the parol agreement was good as a defence ; this was on the ground of fraud.(d) An oral contract within the Statute of Frauds may be a good defence in equity also.(e) The value of equitable defence even in a common-law action has, from an early day in Pennsylvania, been great; and applies to cases within the Statute of Frauds. Thus, to a suit on a bond for the price of land, secured also by mortgage, oral evidence has been admitted to show that the parties agreed that the vendor should not part with the bond ; that the vendee, if not satisfied with the property, should have the privilege of reconveying it, and that the vendee requested the insertion of this stipulation in the bond, and that the vendor said it was unnecessary to do so. This ruling, as infringing upon the rule that oral evidence is not admissible to vary a writing, would be extreme, perhaps, in any other State than Pennsylvania.(f) It was admitted by the Supreme Court that if the contract to repurchase had been a separate one, the Statute of Frauds might have applied.

The defence to a suit on a note that there was an oral promise to take certain land in satisfaction of it, is sufficient, the defendant having procured and tendered title in the land.(g) To a suit for use and occupation, it is a good defence that the defendant had paid the plaintiff the price of the land under an oral contract of sale, and that the plaintiff, the vendor, had given the defendant a promissory note for the amount, on which note was endorsed a statement that when the title was given the note should be surrendered.(h) An oral contract relating to land may be a good defence to an action of trespass ; see § 509.(i) A son holding land under an invalid oral gift can retain the land till repaid his services, for which he has a lien.(j) Where one who has made an invalid parol promise to pay gold coin, and who has given a deed of land as security, seeks to have the deed declared to be a mortgage, and to be allowed to redeem, he must perform the parol promise before he can recover.(k)

The difference between the availability of the oral contract to the

(d) *Harrow v. Johnson*, 3 Metc. (Ky.) 582.

(e) *Shoofstall v. Adams*, 2 Grant, (Pa.) 212; *Nichols v. Nichols*, 1 A. K. Marsh. 166 (a suit for specific performance).

(f) *Greenawalt v. Kohne*, 4 W. N. C. 497; 85 Pa. St. 369.

(g) *Cooley v. Osborne*, 50 Ia. 531; *Cassiday v. Askin*, 2 W. N. Cas. 82.

(h) *Little v. Pearson*, 7 Pick. 301.

(i) *Crosby v. Wadsworth*, 6 East, 609.

(j) *Speers v. Sewell*, 4 Bush, 240.

(k) *Cowing v. Rogers*, 34 Cal. 652; see *Butterfield's Appeal*, 77 Pa. St. 199.

defendant on the one hand, or to the plaintiff on the other, is well illustrated by the following case. The plaintiff, suing to recover the value of a certain interest in a company, procured by him for the defendant, cannot show that though the interest (which, if taken as it stood, was only a certain amount) would, under the terms of a special contract not capable of performance within a year, be of a higher estimated value; the defendant, on the contrary, might prove the oral special contract in order to show that under the terms thereof the interest was of a lesser value.^(l) The Statute of Frauds is a shield and not a sword.^(m)

§ 493. Well established as is the availability of an oral contract to some extent as a defence, there is authority for denying the unqualified admission of this exception to the Statute of Frauds; and it has been said that an invalid oral contract is no more available in defence, than as a ground for recovery.⁽ⁿ⁾ Thus, while it was admitted that fraud, mistake, or subsequent alteration were good by way of defence to a suit for specific performance, it was held in a New Jersey case that an oral contract within the Statute of Frauds was, without more, to no greater degree available on behalf of the defendant than it was on behalf of the plaintiff.^(o)

The Supreme Court of Illinois, quoting the words of the Statute of Frauds, viz., "No action shall be brought," &c., said: "We regard the law clearly settled that a contract within the condemnation of this section cannot be made the ground of a defence any more than of a demand; that the obligation of the plaintiff to perform it is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case."^(p) In this case, however, the defend-

^(l) Whipple v. Parker, 29 Mich. 371.

^(m) Craig v. Van Pelt, 3 J. J. Marsh.

491; Jervis v. Berridge, 42 L. J. Ch.

518; Kilborn v. Forrester, Drap. (U. C.)

346.

⁽ⁿ⁾ Comes v. Lamson, 16 Conn. 246;

King v. Welcome, 5 Gray, 41; Finch v.

Finch, 10 Ohio St. 505; Buck v. Pick-

well, 27 Vt. 158; Williams v. Doran,

8 C. E. Green, 387; Scotten v. Brown, 4

Harring. 324; Bernier v. Cabot Man.

Co., 71 Me. 508.

^(o) Stoutenburgh v. Tompkins, 1

Stockt. 335.

^(p) Wheeler v. Frankenthal, 78 Ill.

126, citing Brown on Frauds, § 131;

Comes v. Lamson, 16 Conn. 246; Scotten

v. Brown, 4 Harr. (Del.) 324; King v.

Welcome, 5 Gray, 41; Payson v. West,

Walker (Miss.), 515; Sennett v. John-

son, 9 Pa. St. 335; Finch v. Finch, 10

Ohio 507; Scott v. Bush, 26 Michi-

gan, 418.

ant was attempting a counter-charge rather than a mere defence, the plaintiff's claim being for a forcible entry and detainer. So in a Delaware case, it was held that an invalid parol agreement can no more be set up by way of a defence than it can be sued on. In this case the plaintiff sued for work and labor done on the defendant's land. The defendant set up an invalid parol agreement concerning the land, by which the plaintiff was to get his pay through a lease thereof; the plaintiff had cleared a certain meadow, and by the contract he was to have the land for three years upon condition of seeding it.(g)

The Statute of Frauds will not allow, as a defence to a promissory note, oral evidence of a subsequent agreement that the amount of the note, with certain goods, should go towards the price of land orally sold by the defendant to the plaintiff, and of which the latter had taken possession.(r) Following in the same line, it has been held that an oral ante-nuptial contract under which a wife was to give up her dower, is no defence to a suit for the latter. The words of the Statute of Frauds, "no action shall be brought," do not mean to exclude a defendant from its operation.(s) Where, to a declaration in *assumpsit* for lodging the defendant's wife, the defendant pleaded that it was agreed, subsequently to the original contract as to the boarding, that the plaintiff should look to the defendant's son J. B. for £9 in full of his claim, and that J. B. had tendered the plaintiff this amount, and the plaintiff demurred on the ground of the Statute of Frauds, his demurrer was sustained.(t)

Where the defendant bought a horse from B., who warranted it sound, &c., and the plaintiff's intestate orally guaranteed this warranty, and at the defendant's request paid the price of the horse to B.: the defendant cannot, in a suit to recover this price, set up the

(g) *Scotten v. Brown*, 4 Harring. 324.

(r) *McCollum v. Jones, Tay*, (U. C.), 611.

(s) *Finch v. Finch*, 10 Ohio St. 505.

A father gave land by parol to his son, who took possession and made improvements. Afterwards the son owed his father by note \$45. The father promised to sell the land and keep from the purchase-money the amount of the note, and give the son the balance. The

father, after he had sold the land, died, and this action by his administrator was brought against the son on the note: it was held, the parol contract as to sale of land could not be a defence either at law or equity; *Adamson v. Lamb*, 3 Blackf. 446.

(t) *Case v. Barber*, T. Raym. 450; as to the effect of a subsequent alteration, see the chapter on that subject.

oral guaranty.(u) A verbal promise by a vendee of land to reconvey upon failure to pay the purchase-money is within the Statute of Frauds, and will not interfere with the enforcement of a lien for the purchase-money.(v) A statute allowing an equitable title to be given in defence to a suit on the legal title to land, requires plain written evidence of such equitable title.(w)

Where the oral contract is used as a set-off, a defence in which the defendant is a *quasi* actor, there is less doubt as to the Statute of Frauds strictly applying. Thus to a suit on a note the statute forbids the admission of evidence to show that the plaintiff was in default on a certain contract with the defendant as to standing timber.(x) The right to recover the price of land sold and orally agreed to be resold cannot be enforced even as a set-off.(y)

§ 494. Whether the contradiction between the two lines of cases given above can be entirely reconciled may be doubted; but such an end, if to be attained at all, must be so by modifying and limiting the statement that as a defense an oral contract within the Statute of Frauds is good. Thus it may be said that an oral contract is admissible to show that the suit has been prematurely brought,(z) or that a writing relied on by the plaintiff is not a correct statement of the agreement between the parties; see "Memorandum."(a) Where the writings and the plaintiff's admission show that the parties contemplated a different matter in the contract, there is good reason for refusing specific performance.(b)

Oral evidence that a written memorandum made by an auctioneer does not contain a stipulation that the vendee should have the right to examine the title, and if not satisfied with it should not be obliged to take the land, is admissible in defence to a suit for

(u) *Glenn v. Rogers*, 3 Md. 322. A verbal agreement by one co-tenant to convey his interest to another, has been held no bar to a partition, though the deed was signed and acknowledged but not delivered; *Polhemus v. Hodson*, 4 C. E. Green, 64.

(v) *Gallagher v. Mars*, 50 Cal. 25.

(w) *Davis v. Teays*, 3 Gratt. 288.

(x) *Lawrence v. Smith*, 27 How. Pr. 327.

(y) *Sennett v. Johnson*, 9 Pa. St. 336.

(z) *Montague v. Garnett*, 3 Bush, 297.

(a) *Wood v. Scarth*, 2 K. & John. 38; *Gully v. Grubbs*, 1 J. J. Marsh. 387.

(b) *Marshall v. Berridge*, L. J. 51 Q. B. 334.

specific performance, the writing not expressing the true agreement.(c) In a somewhat singular English case it was said that the principle on which the doctrine of defence goes may enure to the plaintiff, as where the latter had sold to X., and X. partly in writing and partly by parol, assigned to the defendant, and the plaintiff asked in equity to have the later contract rescinded that he might carry out the original contract with X.; here it was held that as the plaintiff sought to rescind, not to establish the oral contract, the defendant by the excuse of the Statute of Frauds could not stand on the written part only of his contract, and resist the plaintiff's demand;(d) and, as will be seen in another chapter, fraud or mistake, when relied on as a defence, forms an exception to the Statute of Frauds.(e)

Oral declarations made by an auctioneer as to the quantity of land sold are admissible in a suit for specific performance.(f) And it has even been held that the plaintiff cannot disprove an alleged mistake, through which certain premises were omitted from a memorandum, by showing that the omission was under an oral contract invalid under the Statute of Frauds.(g)

§ 495. Another application of the rule that an oral contract is available to a defendant, is where, being express, it is used to rebut an implied contract. For an express and implied contract cannot co-exist.(h) Thus, where the plaintiff brought a bill for specific performance of a lease of a public-house from the defendant, a brewer, the plaintiff asked for a general lease and the written contract showed no restriction; parol evidence was admitted to show that the contract was for a restricted lease, and the plaintiff was allowed to recover only upon agreeing to accept the restriction.(i)

While admitting that one in possession of land under an oral sale within the Statute of Frauds was a tenant at will, the Supreme

Express invalid oral contract admissible to rebut an implied one.

(c) *Averett v. Lipscomb*, 14 Reporter, 605; *Kine v. Balfe*, 2 Ball & Beat. 798; 76 Va. 405.

(d) *Jervis v. Berridge*, 42 L. J. Ch. 518.

(e) *Stoutenburgh v. Tompkins*, 1 Stockt. 335; *Mayer v. Adrian*, 77 N. Car. 84; *Frederick v. Campbell*, 13 S. & B. 141; *Cabot v. Christie*, 42 Vt. 125; *King v. Buckman*, 6 C. E. Green,

(f) *Winch v. Winchester*, 1 V. & B. 378.

(g) *Lawson v. Lande*, 1 Dick. 346.

(h) *Hall v. Denholm*, 11 U. C. Q. B. 356; *King v. Woodruff*, 23 Conn. 60.

(i) *Barnard v. Cave*, 26 Beav. 254.

Court of Maine said: "Still he had no lease, verbal or otherwise. He went in under no promise, express or implied, to pay rent, but under a contract of purchase. If the conditions of that contract had been fulfilled, no obligation to pay rent would have resulted from his occupation. His liability to pay rent arises only from an implied promise resting upon his failure to comply with the terms of his contract. *Patterson v. Stoddard*, 47 Maine, 355; *Gould v. Thompson*, 4 Met. 224. It follows that while he was in possession under his contract of purchase—that being in force either by payments of the price so far as it had become payable, or a waiver by the vendor of any failure of performance—the relation of landlord and tenant did not exist between these parties."(*j*) There can be no compensation for goods delivered in payment of a sum due under an oral contract within the Statute of Frauds, the express contract negating an implied one.(*k*) Where suit is on a memorandum which, saying nothing as to time of payment, raises a presumption of cash payment, it is a good defence provable by parol that credit was agreed upon.(*l*) And a common instance of the employment of an express invalid oral contract, is as a defence to an action for use and occupation.(*m*) And an analogous rule prevails under the stamp laws, and where there is a written contract inadmissible because not stamped, the owner cannot drop the writing and go for use and occupation.(*n*) But the defendant must have been in no default under the oral contract; and where being lessee he refused to take the lease, he cannot set up the oral contract of letting in defence to an action for use and occupation.(*o*) So where the defendant made a verbal contract with the plaintiff for the purchase of certain real estate, and with his permission went into the occupation thereof. Neither party was liable to the other for not performing his part of this contract. After remaining in possession two years, the defendant voluntarily abandoned the premises, and the plaintiff has brought this action of *assumpsit* for the use and occupation, and he was allowed to recover.(*p*)

The use of an oral express contract to negative an implied one,

(*j*) *Lapham v. Norton*, 71 Me. 88.

(*k*) *Foote v. Emerson*, 10 Vt. 342.

(*l*) *Smith v. Jones*, 7 Leigh, 172.

(*m*) *Lockey v. Lockey*, Prec. Ch. 519;
Corrigan v. Woods, 1 Ir. Rep. C. L.

75; *Trustees of Toronto Hosp. v. Heward*, 8 U. C. C. P. 84.

(*n*) *Brewer v. Palmer*, 3 Esp. 213.

(*o*) *Little v. Martin*, 3 Wend. 219.

(*p*) *Patterson v. Stoddard*, 47 Me. 356.

has been extended to the case of a contract as to personalty; and oral proof of a promise to buy at the shipping price is a defence to a recovery as for a reasonable price.(g) And the doctrine extends to contracts not to be performed within a year, and all other agreements coming within the terms of the Statute of Frauds.(r)

In a case in Bush it was decided that *assumpsit* lies on an implied promise to pay for goods delivered under an invalid oral contract to return them at the end of three years; that the contract was not void, though no action could be brought upon it, and that the defendant might set it up to protect himself from suit till the end of the three years.(s) It may be questioned whether this ruling was not a substantial enforcement of the oral contract; see § 508.

§ 496. An invalid oral contract may be used to rebut an equity.(t) Sir William Grant said that the "Statute of Frauds had not altered the situation of a defendant against whom specific performance is prayed."(u) In a Pennsylvania case it was said that the defendant is not in possession under a mere parol title. He has the legal estate, and he may rebut any supposed equity of the plaintiff by parol evidence, without violating the Statute of Frauds. Such evidence is in support of the written title, and not in opposition to it.(v) But Lord Eldon said that even to rebut an equity, oral evidence affecting a right in realty was inadmissible under the Statute of Frauds.(w)

Where there is oral proof of a difference of understanding as to the contract between the parties to it and on its face it is ambiguous, specific performance will be refused.(x) An equitable claim against land can be met by a receipt in satisfaction of all claims, the latter being good, though not as a memorandum under the Statute of

- (g) *Acebal v. Levy*, 10 Bingh. 380. 439; *Workman v. Guthrie*, 29 Pa. St. 445; *Harper v. Davies*, 45 U. C. Q. B. 495; *Butterfield's Appeal*, 77 Pa. St. 199; *Crommelin v. Theiss*, 31 Ala. 418; 199; *Carpenter v. Otley*, 2 Lans. 458; *Galvin v. Prentice*, 45 N. Y. 162. *Dana v. Hancock*, 30 Vt. 616.
- (s) *Montague v. Garnet*, 3 Bush, 297. (u) *Clark v. Grant*, 14 Ves. 524.
- (t) *Legal v. Miller*, 2 Ves. Sr. 299; (v) *Myers v. Myers*, 25 Pa. St. 101.
- Gordon (Lord) v. Hertford (M. of)*, 2 (w) *Robinson v. Gee*, 1 Ves. Sr. 253, distinguishing *Walker v. Walker*, 2 Atk. Madd. 121; *Walker v. Walker*, 2 Atk. 98, as a case of fraud.
- (see *Clinan v. Cooke*, 1 Sch. & Lef. 31); (x) *Higginson v. Clowes*, 15 Ves. Goucher v. Martin, 9 Watts, 109 (see *Raffensberger v. Cullison*, 28 Pa. St.) 521.

Frauds, yet as an evidence of accord and satisfaction.(y) Where, however, the receipt was so expressed as to leave it doubtful whether the plaintiff's equitable claim to have an absolute deed regarded as a mortgage was referred to, the defence was held not to be made out.(z) Generally in case of doubt equitable relief will be refused. Thus, where the plaintiff sought to restrain the defendant corporation from using a track laid by it over his ground till it had made compensation, the injunction will be refused upon oral proof that the plaintiff had agreed to give his land if the defendant would alter its track, and that it had done so.(a)

The right of contribution among sureties can be shown to have been orally waived or changed.(b) Where one surety paid the debt and sues the other for contribution, his right is only an equity, and can be rebutted by proof that the defendant became surety under a promise of indemnity from the plaintiff.(c)

§ 497. A subsequent change of a contract can be shown orally to defeat recovery on the original agreement.(d) Where there was a doubt but that a written lease had been subsequently altered by parol, and this is set up as a defence, the Master of the Rolls sent the case to a master; the bill was for specific performance, brought by a lessee.(e) In a case in Pickering it was decided that though under the then statute of Massachusetts giving the Courts of Chancery jurisdiction only to grant specific performance of contracts in writing, the facts being that there had been a contract in writing to make a deed when certain notes were due, parol evidence to show that the agreement had been changed so as to make the deed deliverable before the notes were due, was not admissible in an action for specific performance, yet *semble* that as a defence to a bill for specific performance it might have been received.(f)

(y) Grumley v. Webb, 48 Mo. 571.
(z) Odell v. Montross, 68 N. Y. 502.
(a) Pettibone v. Lacrosse R. R., 14 Wis. 446.

(b) Blake v. Cole, 22 Pick. 97; Barry v. Ransom, 12 N. Y. 462. *Semble*, that an executed oral contract, though within the Statute of Frauds, is a good defence to a suit for contribution; Craig v. Van Pelt, 3 J. J. Marsh. 491.

(c) Rae v. Rae, 6 Ir. Ch. 494.
(d) Cusey v. Hall, 81 Ill. 161 (especially with part performance); Dana v. Hancock, 30 Vt. 619; Lawrence v. Dole, 11 Vt. 555; Long v. Hartwell, 5 Vroom, 121; Ryno v. Darby, 5 C. E. Green, 231; Stoutenburgh v. Tompkins, 1 Stockt. 335; Stevens v. Cooper, 1 Johns. Ch. 429.
(e) Van v. Corpe, 3 M. & K. 277.
(f) Brooks v. Wheelock, 11 Pick. 439.

Where the plaintiff orally assents to a certain term being added to the writing, the defendant insisting that the term in question was part of the contract, specific performance will be given of the contract as thus shown, notwithstanding the defendant's objection, but *semble* that if the plaintiff had refused his assent to the oral term, his bill would have been dismissed.(g) Where a subsequent oral change is made of a written contract, the latter, as changed, will be enforced if the party sought to be charged does not avail himself of the Statute of Frauds.(h) *A fortiori*, an entire rescission of a contract is provable by parol by way of defence.(i)

§ 498. In a suit for services rendered, brought on a *quantum meruit*, oral evidence of an express contract within the Statute of Frauds may be offered to negative the existence of an implied contract as to the same subject.(j) The defendant can show that the contract was entire, and that the plaintiff has not fully performed.(k) Where the plaintiff sued for the value of services, and the defendant relied on an oral contract to take pay in land, the allowance of this defence is not inconsistent with the rule that part payment is not part performance, or with the rule of mutuality of remedy, the rule as to part payment being for the protection of the vendor, and the mutuality being complete, or if impaired, being so by the act of the plaintiff himself.(l)

An invalid oral contract is admissible to rebut the implication that services by one member of a family to another were gratuitous, and this even on behalf of the plaintiffs.(m) An employer sued for services can orally show that the plaintiff agreed to take the place of a former employé, and upon the terms that the employer should deduct from the salary money due him by such former employé: such an agreement is not within the guaranty clause of the Statute of Frauds, being an agreement to serve a cer-

(g) *Martin v. Pycroft*, 2 De G. M. & G. 794; 22 L. J. Ch. 95.

(h) *Ryno v. Darby*, 5 C. E. Green, 231.

(i) *Raffensberger v. Cullison*, 28 Pa. St. 439; *Boyce v. McCulloch*, 3 W. & S. 432; *England v. Jackson*, 3 Humph. 584; *Hotchkiss v. Cox*, 47 Ia. 657; *King v. Morford*, Saxt. (N. J.) 230.

(j) *Hambell v. Hamilton*, 3 Dana, 501; *Philbrook v. Belknap*, 6 Vt. 386; *Fowler v. Burget*, 16 Ind. 343; *Townsend v. Moore*, 30 Ohio (Comm.), 185.

(k) *Clark v. Terry*, 25 Conn. 395; *Swanzy v. Moore*, 22 Ill. 65; *Philbrook v. Belknap*, 6 Vt. 386.

(l) *Mitchell v. McNab*, 1 Bradw. 300.

(m) *Van Schoyck v. Backus*, 9 Hun, 68.

tain time for nothing in order to get the place.(n) This rule has, however, been denied, and evidence of a special oral contract within the Statute of Frauds has not been allowed as a defence to a suit for services;(o) and even in Indiana it was held that to a suit by an(p) apprentice for the value of his services it was no defence that there was an oral contract within the Statute of Frauds that he should remain in the employment till of age, and that he had left before that time. There is also conflict of authority on the question of the admissibility in evidence of an oral contract that the plaintiff should take the pay for his services in land. The evidence in a recent Massachusetts case was received, the court saying that the plaintiff could not force the defendant to take his stand on the Statute of Frauds.(q)

✓ In a late case the Supreme Court of New York said: "It is not worth while to discuss the question whether the agreement between the parties was incapable of being enforced, provided either had refused to fulfill. That question is not before us. No goods were sold and delivered to the defendant under an agreement to pay for the same in cash, but the same were furnished by the one and accepted by the other, with the understanding that the buyer was not to pay for them in money, but by work to be done for a third person, who in turn agreed to deliver to the seller, and did deliver to such seller lumber out of which payment of goods was to be made. The goods can no more be compelled to be paid for in money, than a party, when a contract originally void by the Statute of Frauds, but fully executed and completed by both parties, can recover back money paid and accepted in execution thereof, upon the ground that the performance of the agreement could not have been enforced."(r) But the evidence was rejected in a late Pennsylvania and in a Michigan case.(s)

An invalid oral contract may be proved to rebut the implication

- (n) *Walker v. Hill*, 5 H. & N. 419. *Moore*, 1 Blackf. 253; *Mitchell v. McNab*, 1 Bradw. 300; *Lingle v. Clemens*, 17 Ind. 124; see *Bechtel v. Cone*, 52 Md. 706, where, however, there had been performance.
 (o) *Hearne v. Chadbourne*, 65 Me. 306; *McGartland v. Stewart*, 2 Houst. (Del.) 277.
 (p) *Tague v. Hayward*, 25 Ind. 427; but see *Lingle v. Clemens*, 17 Ind. 124; *Johnson v. Moore*, 1 Blackf. 253.
 (q) *Riley v. Williams*, 123 Mass. 509, 4 W. N. Cas. 501; *Sutton v. Rowley*, 44 Mich. 113, citing cases.
 (r) *Wheeler v. Spencer*, 24 Hun, 30.
 (s) *Sands v. Arthur*, 84 Pa. St. 481;

that the service began at once, and to show that it was a contract for a year's service beginning at a future date, and therefore within the Statute of Frauds.(t) It has been held in Massachusetts that an oral agreement not to be performed within a year cannot be set up in defence to a *quantum meruit* for services performed under it.(u) An invalid parol contract that the plaintiff was to serve the defendant for three years, but to get nothing till the full time had been served, is admissible as a defence to a *quantum meruit* for services actually rendered.(v)

The rule that an oral express contract is admissible to rebut an implied one extends generally to contracts not performable within a year; (w) as where money is lent for a longer period than a year; and an invalid oral contract under which goods were delivered to be returned after three years, a low rate of interest to be paid, may be proved by either party to show that the action had been prematurely brought, and that the amount claimed did not agree with the express contract; (x) or goods are sold not to be paid for within a year; (y) or land so sold.(z) A plaintiff cannot abandon the special contract and recover on an implied one, unless the defendant prevent the performance of the special contract.(a) Where, however, the defendant violates the contract and prevents the plaintiff's performance, the latter may recover though the contract was entire.(b) And it has even been held that the breach of an oral contract by the plaintiff will not preclude a recovery on a *quantum meruit* for services actually rendered.(c)

An invalid oral contract under which a specially low rate of interest is agreed upon is good as a defence.(d) As will be seen else-

(t) *Brittain v. Rossiter*, 48 L. J. Exch. 362; 40 L. T. N. S. 240; 27 W. R. 482.

(u) *King v. Welcome*, 5 Gray, 41, distinguishing *Coughlin v. Knowles*, 7 Metc. 57; see also *Bernier v. Cabot Man. Co.*, 71 Me. 503.

(v) *Philbrook v. Belknap*, 6 Vt. 386. But see *Hambell v. Hamilton*, where *semble* there was no stipulation for entire service.

(w) *Clark v. Terry*, 25 Conn. 395; *Abbott v. Inskip*, 29 Ohio St. 59; *Davenport v. Gentry*, 9 B. Mon. 428.

(x) *Roberts v. Tennell*, 3 T. B. Mon. 247.

(y) *Montague v. Garnett*, 3 Bush, 297.

(z) *Gully v. Grubbs*, 1 J. J. Marsh. 388; see *Rake v. Pope*, 7 Ala. 161.

(a) *Owings v. Low*, 7 Harr. & Johns. 133.

(b) *Hambell v. Hamilton*, 3 Dana, 501.

(c) *Comes v. Lamson*, 16 Conn. 246; *Amburger v. Marvin*, 4 E. D. Smith, 393.

(d) *Roberts v. Tennell*, 3 T. B. Mon. 247; *Montague v. Garnett*, 3 Bush, 297.

where, an oral license revocable and not enforceable will enure as a defence to an action of trespass; see *infra*.(e) Possession under a parol sale of land by one who entered and paid part of price but failed to pay residue, will not subject such a person to liability as tenant or trespasser to another to whom the original owner afterwards conveyed the land.(f) An invalid contract of letting under the Statute of Frauds is a good defence to action of unlawful detainer brought before the time agreed upon had expired.(g)

In trover for a deed, an oral agreement that the defendant should have it upon certain conditions is admissible, notwithstanding the Statute of Frauds.(h) An oral reservation of a growing crop, with a right to enter and cut, is a good defence to an action of trespass; (i) an invalid oral contract as to land within the Statute of Frauds is a good defence to a trespass.(j) Where there is an express trust no constructive trust can arise; this was the rule at common law, and the Statute of Frauds has made no change. Therefore an invalid oral express trust can be used as a defence to an action on a constructive trust; see also chapter on "Trusts."(k) Thus, where C. D., being indebted to Mrs. Jamison, agreed to buy for her a certain cottage, paid the price, was credited with the payment on Mrs. Jamison's books; title was taken by J. D. under an express parol trust for Mrs. Jamison, and the letter went into notorious and exclusive possession under the contract; it was held that the parol express trust under the circumstances could be admitted to disprove the resulting trust in C. D. arising from the payment.(l)

In a Connecticut case the query was made whether a resulting trust could upon oral proof be set up to defeat a deed reciting an express trust inconsistent therewith.(m) In suit for dower the de-

(e) *Cook v. Stearns*, 11 Mass. 533; (j) *McMullen v. Mayo*, 8 Sm. & Dubois v. Kelley, 10 Barbour, 507; Marsh. 298; *Berkey v. Auman*, 91 Pa. Walter v. Dexter, 34 U. C. Q. B. 426; St. 484. *Pierrepont v. Barnard*, 5 Barb. 364; (k) *Bellasis v. Compton*, 2 Vern. 295; *Green v. N. Car. R. R.*, 73 N. Car. 524; as to personality see *Swift v. Wylie*, 5 Roberts. 686. *Botsford v. Burr*, 2 Johns. Ch. 409; *Kingsbury v. Burnside*, 58 Ill. 328; *Mercer v. Stark*, 1 Sm. & M. Ch. 87; *Roe v. Popham*, 1 Doug. 24; *Whiting v. Gould*, 2 Wis. 589.

(f) *Ripley v. Yale*, 16 Vt. 260.
(g) *Rogers v. Hackett*, 49 Cal. 123.
(h) *Dowling v. Miller*, 9 U. C. Q. B. 227.

(i) *M'Ginness v. Kennedy*, 29 U. C. Q. B. 95.

(l) *Jamison v. Miller*, 27 N. J. Eq. 590.

(m) *Selden's Appeal*, 31 Conn. 548.

fence of accord and satisfaction or part performance is good in equity, though not at law.⁽ⁿ⁾ Where a widow, to induce a vendee to give a higher price, promised that dower would not be claimed, it was doubted whether even in equity the defence was good.^(o)

§ 499. As part performance will justify a recovery in spite of the Statute of Frauds, it is all the stronger when set up merely in defence;^(p) thus, as against a trespasser.^(q) An ^{Part per-}oral contract of sale of land, partly performed by possession, is a good defence to an action only on a paper-title brought with knowledge of the former: and the vendee under the oral contract can hold the land for his purchase-money paid, for which he has a lien.^(r) But the evidence must be as full and clear as if the contract were being sued on.^(s)

In a case in 54 Pennsylvania State Reports, a somewhat curious result is arrived at: The court, while admitting that an oral contract of exchange of land was not sufficiently proved to be decreed as against the Statute of Frauds, on the ground of part performance, held that they would enjoin an ejectment where the complainant showed that he had entered upon certain land belonging to the respondents with their permission, and had made great improvements, the only proof of any contract being a vague understanding that "other land" was to be given by the complainant and taken by the respondent in lieu of the property in suit.^(t)

An oral waiver of damage from flowage is a good defence after the erection of a mill in reliance upon the waiver.^(u) The rule of part performance in defence applies to contracts not to be performed within a year.^(v) And to a constructive trust used as a defence to an express trust.^(w) An oral gift may under circumstances of trust or part performance be a defence to a suit to recover the price of

(n) *Keeler v. Tatnell*, 3 Zab. 62 (*semble*).

(o) *Moore v. Tisdale*, 5 B. Mon. 358.

(p) *Wallace v. Brown*, 2 Stockt. 310; *Hobbs v. Wetherwax*, 38 How. Pr. 388; *Haines v. Haines*, 6 Md. 439.

(q) *Yale v. Seely*, 15 Vt. 230.

(r) *Brown v. East*, 5 T. B. Mon. 408; see *Lucas v. Mitchell*, 3 A. K. Marsh. 244.

(s) *Ells v. Pacific R. R.*, 51 Mo. 204.

(t) *Big Mountain Improvement Co. App.*, 54 Pa. St., 370.

(u) See *Smith v. Goulding*, 6 Cush. 155; *Seymour v. Carter*, 2 Metc. 520; *Fitch v. Seymour*, 9 Metc. 462; *Bridges v. Purcell*, 1 Dev. & B. 492; *McCue v. Smith*, 9 Minn. 258; *Clement v. Durgin*, 5 Greenl. 14.

(v) *Stone v. Dennison*, 13 Pick. 4.

(w) *Faris v. Dunn*, 7 Bush, 276.

land.(x) The acceptance of rent under an invalid oral lease enables the lessee to give proof of the lease in order to show that a certain track put down by him under the lease could be renewed by him.(y) It has been denied that part performance has any effect at law, even though by way of defence.(z) And in a Missouri case it was held that an invalid lease partly performed is not a defence in an action for forcible detainer.(a)

§ 500. An oral contract within the Statute of Frauds to be used as a defence must be clearly proved.(b) To enable a defendant to make out a case of fraud or mistake, he must, if the Statute of Frauds applies, bring very clear evidence.(c) In Iowa, if the defendant is called upon to testify, his testimony is equivalent to a writing, and cannot be contradicted: See § 538.(d)

(x) *Park v. White*, 4 Dana, 557. In the case of chattels, see *Bowie v. Bowie*, 1 Md. 94.

(y) *Cayuga R. R. v. Niles*, 13 Hun, 172.

(z) *Creighton v. Sanders*, 89 Ill. 583; *Brockway v. Thomas*, 36 Ark. 518.

(a) *Ridgley v. Stillwell*, 29 Mo. 403.

(b) *Nichols v. Nichols*, 1 A. K. Marsh. 166.

(c) *Vouillon v. States*, 2 Jur. N. S. 845; 25 L. J. Ch. 875.

(d) *Hunt v. Coe*, 15 Ia. 197; *Smith v. Phelps*, 32 Ia. 539.

CHAPTER XXIII.

PLEADING.

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§ 539. When the objection of the statute

must be made, and duty of court in the matter.

§ 540. The rule after verdict.

§ 541. The objection of the statute when first taken in proceeding in error. Appeal from magistrate.

§ 501. A CONTRACT within the Statute of Frauds need not be averred in the declaration to have been in writing; for the Statute of Frauds introduces a rule of evidence, not of pleading.(a)

Contract within statute need not in pleading

(a) *Anon.*, 2 Salk. 519; *Ereskine v. Murray*, 2 Stra. 817; *Spurrier v. Fitzgerald*, 6 Ves. 548; *Lilly v. Hewitt*, 11 Price, 500; *Young v. Austen*, L. R. 4 C. P. 553; *Lynch v. Musgrave*, Hay & J. 829; *Tronson v. Callan*, 1 Hud. & Br. 113; *Greenham v. Watt et al.*, 25 U. C. Q. B. 369, 370; *Martin v. Arthur*, 16 U. C. Q. B. 484; *Kilroy v. Simkins*, 26 U. C. C. P. 287; *Pettigrew v. Pettigrew*, 1 Stew. (Ala.) 580; *Johnson v. Hanson*, 6 Ala. 351; *Blick v. Briggs*, 6 Ala. 687; *Brown v. Barnes*, 6 Ala. 694; *Bell v. Owen*, 8 Ala. 312; *Kizer v. Lock*, 9 Ala. 269; *Perrine v. Lachman*, 10 Ala. 140; *Gillespie v. Battle*, 15 Ala. 279; *Thompson v. Hall*, 16 Ala. 207; *Robinson's Adm'r v. Tipton*, 31 Ala. 607; *Rigby v. Norwood*, 34 Ala. 131; *Martin v. Wharton*, 38 Ala. 641; *Ritch v. Thornton*, 65 Ala. 309; *Bunting v. Beideman*, 1 Cal. 182; *Wakefield v. Greenhood*, 29 Cal. 599; *Vassault v. Edwards*, 43 Cal. 463; *Lehow v. Simonton*, 3 Col. 346; *Seymour v. Mitchell*, 2 Root, 145; *Clark v. Brown*, 1 Root, 78; *Long v. Lewis*, 16 Ga. 154; *Rugles v. Gaton*, 50 Ill. 414, citing cases. In Indiana before the Code of 1843; *Mills v. Kuykendall*, 2 Blackf. 48; *Bailey v. Ricketts*, 4 Ind. 490; *Miller v. Upton*, 6 Ind. 53; *Booker v. Ray*, 17 Ind. 523; *Fall v. Hazelrigg*, 45 Ind. 576; *Krohn v. Bantz*, 68 Ind. 278; but as to law since 1843 see below; see also *Rain-*

bolt v. East, 56 Ind. 538; *Martin v. M'Fadin*, 4 Litt. 242; *Smith v. Coleman*, 1 Bibb, 488; *Drace v. Wyat*, 1 A. K. Marsh. 336; *M'Dowel v. Delap*, 2 Marsh. 33; *Baker v. Jameson*, 2 J. J. Marsh. 547; *Kibby v. Chetwood*, 4 T. B. Mon. 92; *Brown v. East*, 5 id. 408; *Bull v. McCrea*, 8 B. Mon. 423; *Cleaves v. Foss*, 4 Greenl. 1; but since R. S. c. 96, §10, see *Hunt v. Roberts*, 40 Me. 193; *Hobart v. Andrews*, 21 Pick. 534; *Price v. Weaver*, 13 Gray, 273; *Mullaly v. Holden*, 123 Mass. 584; *Dayton v. Williams*, 2 Doug. (Mich.) 31; *Hanchett v. McQueen*, 32 Mich. 24; *Walsh v. Kattenburgh*, 8 Minn. 130; *Armstrong v. Vrooman*, 11 Minn. 222; *Miles v. Jones*, 28 Mo. 89; *Gist v. Eubank*, 29 Mo. 249; *Donaldson v. Newman*, 9 Mo. App. 242, citing *Hook v. Turner*, 22 Mo. 334; *Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78; *Marston v. Swett*, 66 N. Y. 206; *Walker v. Richards*, 39 N. H. 264; *Miller v. Drake*, 1 Caines, 46; *Eiting v. Vanderlyn*, 4 Johns. 237; *Nelson v. Dubois*, 13 Johns. 177; *Cozine v. Graham*, 2 Paige, Ch. 179, citing English cases; *Coles v. Bowne*, 10 Paige, Ch. 535; *Stern v. Drinker*, 2 E. D. Smith, 401, citing cases; *Gibbs v. Naah*, 4 Barb. 452; *Dewey v. Hoag*, 15 Barb. 368; *Hilliard v. Austin*, 17 Barb. 141; *Marston v. Swett*, 66 N. Y. Ct. of App. 206; see *Donaldson v. Newman*, *supra*; *New York &c. Loan Co. v. Helmer*, 5

The presumption is that the contract was in writing,^(b) and a written promise can be proved under a declaration not averring the writing.^(c) The rule is the same in equity.^(d) be averred to be in writing.

In an Irish chancery case it was said that the written contract did not have to appear in the pleadings or expressly form part of the issue.^(e) A bill to enforce a trust need not state it to have been in writing.^(f) In New Hampshire the rule was considered exceptional but well settled.^(g) In Indiana the Supreme Court said: "The notice in this case stands in the place of a declaration, and contains the plaintiff's cause of action. A parol agreement for the sale of land was valid at common law. The Statute of Frauds,

N. Y. W. Dig. 197; *Barnes v. Brown*, 71 N. Car. 510; *Hepworth v. Pendleton*, 5 Amer. Law Rec. 235 (Super. Ct. Cincin.), 1 Cinc. Law Bull. 300; *Reinheimer v. Carter*, 31 Ohio St. 586; *Wallis v. Frazier*, 2 N. & McC. 180; *Townsend v. Sharp*, 2 Overt. 192; *Carroway v. Anderson*, 1 Humph. 61; *Macey v. Childress*, 2 Tenn. Ch. (Cooper), 442-6-7-9, 454; *Adkins v. Watson*, 12 Tex. 199; *Dogget v. Patterson*, 18 Tex. 158; *Murphy v. Stell*, 43 Tex. 131; *Cross v. Everts and wife*, 28 Tex. 531; *Lewis v. Alexander*, 51 Tex. 585; *Leasing v. Cunningham*, 12 Reporter, 61 (S. C. Tex.); *First National Bank v. Kinner*, 1 Utah, 102; *Rarey v. Cornell* (Franklin Dist. Ct. Wis.), 2 West. L. M. 415; *Tayl. Ev.* (5th ed.), 303; *Moak & Van Sant Pl.* (3d ed.), 205, n. 4, 206, 255; *Steph. Pl.* 374; *Wms. Saund.* (Sir E. V. Will. ed.) 394 n. and 231 n.; *Gould Pl.*, § 46, p. 193; *Mansel on Demurrer*, L. L. vol. 26, p. *lvi-lvii.

(b) *Brennan v. Ford*, 46 Cal. 16; *Byasse v. Reese*, 4 Metc. (Ky.) 373; *Sherwood v. Saxton*, 63 Mo. 84; *Parker v. Nigge-man*, 6 Mo. App. 547; *Cozine v. Graham*, 2 Paige, Ch. 177; *Coles v. Bowne*, 10 Paige, Ch. 535; *Champlin v. Parish*, 11 Paige, Ch. 405; *Gibbs v. Nash*, 4 Barb. 451; *McCullouch v. Tapp*, 4 West. L. Monthly, 575 (Ohio);

Pettit v. Hamlyn, 43 Wis. 315 (even though the defendant denies the agreement).

(c) *Fiedler v. Smith*, 6 Cush. 339.

(d) *Morgan v. Worthington*, 38 L. T. N. S. 445, criticizing *Wood v. Midgeley*; *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 442; *Green v. Richards*, 8 C. E. Green, 33; *Cranston v. Smith*, 6 R. I. 231; *Piercy v. Adams*, 22 Ga. 109; *Seymour v. Mitchell*, 2 Root, 145; *Clark v. Brown*, 1 Root, 78; *Hubbell v. Courtney*, 5 S. Car. 89; *Wakefield v. Greenhood*, 29 Cal. 599; *Everhart v. Everhart*, 4 Luz. Leg. Reg. 260; *Ralston v. Ralston*, 16 Pitts. L. J. 175; *Hanchett v. McQueen*, 32 Mich. 24; *Whiting v. Gould*, 2 Wis. 593; see *Welford*, Eq. Pl. p. *2; see, however, *Futcher v. Futcher*, 50 L. J. Ch. 737, 29 W. R. 884, 45 L. T. N. S. 306; *Barkworth v. Young*, 4 Drew, 9; 26 L. J. Ch. 153.

(e) *Rice v. O'Connor*, 12 Ir. Ch. 433; 11 id. 514.

(f) *McNabb v. Nicholl*, 3 U. C. L. J. N. S. 21; *Smith v. Ross*, 15 Grant, 374.

(g) *Walker v. Richards*, 39 N. H. 264, citing *Anon.*, 2 Salk. 519; *Duppa v. Mayo*, 1 Wms. Saund. 395; see also *Dayton v. Williams*, 2 Doug. (Mich.) 31.

though it requires the proof of the contract to be in writing, does not affect the rules of pleading. The declaration, since as before the statute, may set forth the agreement without stating it to be in writing.”(h) In California the fact that no copy of the written contract was filed with the clerk of the court below, was held to raise no presumption that the contract was oral, such a step not being necessary.(i) A modern English writer has said that though under the Statute of Frauds it is not strictly necessary to aver a writing, yet that where the suit is upon several promises on one consideration it is better to make the averment, as this shows without repetition that the promises are supported by the consideration.(j)

§ 502. The provision of the Judicature Act of England, Order XIX. Rule 23d, does not alter the law, as it was in regard to the averments of a *narr.*; and renders such an averment unnecessary even in a bill in equity, the averment in the latter case having been previously necessary in the opinion of Fry, J.(k) Before the Revised Statutes of New York the averment of a writing was not necessary, but under that law it was held in one case, now overruled, that it was;(l) the court saying: “The Code, however, has prescribed a new system of pleading, the fundamental rule of which, as to the complaint, is it shall contain a plain and concise statement of the facts constituting the cause of action. In order to constitute a cause of action against a party for the debt or default of another, the law makes it an essential fact, that he should have undertaken to do so by writing subscribed by himself.” The plaintiff was, however, allowed to amend. In Wisconsin the Code was held to have made no change.(m) So in a recent case in Missouri it is held that the Code of Missouri, like that of New York, does not change the old rule of pleading, the court saying that, “Notwithstanding the re-

(h) *Hunt v. Gregg*, 8 Blackf., 108, citing 1 Wms. Saund. 211, 376, n. 1, &c.

(i) *Bunting v. Beideman*, 1 Cal. 182.

(j) *Bull. & Leake*, Prec. page 59 n.

(k) *Fletcher v. Fletcher*, 50 L. J. Ch. 787; see *infra*, *Morgan v. Worthington*, 38 L. T. N. S. 445 (*semble*, however, that the rule in equity was the same before the Judicature Act as since); *Cat-*

ling v. King, 5 Ch. D. 660; 25 W. R. 551. See *Griff. Pract. under Judic. Act*, page 201-2.

(l) *Thurman v. Stevens*, 2 Duer, 610, citing cases. But see *contra* *Marston v. Swett*, 66 N. Y. 206, and see *Bank of Lowville v. Edwards*, 11 How. Pr. 218.

(m) *Robbins v. Deverill*, 20 Wis. 146.

quirement of the Code that facts constituting the cause of action must be stated, it is held now in this State to be the subsisting rule. It may be difficult to see why the Statute of Frauds is new matter of defence, and why a general denial does not sufficiently raise the question, since the plaintiff, in proving his contract, must show it to be one not enforceable at law, if by the evidence it appears that it was within the terms of the statute, and that these terms have not been complied with. But the rule in New York is as we have stated it."⁽ⁿ⁾

§ 503. The distinction is well settled, and is between a statute requiring a writing to evidence a right previously existing and hitherto provable orally, and a statute which creates the right or confers jurisdiction, and at the same time requires written evidence of the subject-matter; in the former case the pleadings of the plaintiff or petitioner need not aver the existence of the writing; in the latter case they must.^(o)

Distinction as to writing required to evidence a right given by statute, and one as to a common-law right.

Thus in a California case it was said that "the petition does not set forth that the contract between the decedent and petitioner was in writing. If the statute gives power to the Probate Court to decree specific performance only of written contracts, an averment of the writing is necessary to give that court jurisdiction. Such averment is not simply analogous to that of a contract in a complaint filed in the District Court, where the contract must be in writing to be valid under the Statute of Frauds. In the latter case an allegation of the terms of the contract has been held to be sufficient, because there can be no such contract except in writing. But if the Probate Court has no jurisdiction to decree a conveyance except when the contract is in writing, the jurisdictional fact must appear on the face of the petition."^(p)

It is urged that the declaration is bad under the Statute of Frauds in not showing a covenant containing a particular descrip-

(n) *Donaldson v. Newman*, 9 Mo. App. 242; the court adding that "since the report of the case of *Hook v. Turner*, 22 Mo. 333, the New York rule has been followed in the later cases in *Missouri*; *Marston v. Swett*, 66 N. Y. 206; *Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78."

(o) See *Wms. Saund*. (Sir E.V. Will. ed.) p. 394 n.; *Steph. Pl.*; *Sayl. Tex. Pl.* § 10; *Birch v. Bellamy*, 12 Mod. 540; *Burkham v. Mastin*, 54 Ala. 125; *Cumberland Coal Co. v. Hoffman Coal Co.*, 22 Md. 499.

(p) *Cory v. Hyde*, 49 Cal. 470.

tion of the land to be conveyed. The argument is, that that statute constructively requires that the written contract for the sale of land should definitely ascertain the land, that if the form of action upon the contract be *assumpsit*, inasmuch as at common law it is not necessary to allege the writing, and the statute has not changed the rules of pleading, the sufficiency of the writing under the statute is only matter of evidence; but that if the form of action be covenant, inasmuch as at common law this form of action does require that a sealed writing be set forth, the declaration must show that the covenant complies with the statute; containing, for example, a particular description of the land. In this case, a compliance with the statute is matter of pleading.”(q)

Under the Scotch law it has been said that “it has been found, that where writing was essential to the obligation, the acknowledgment is not sufficient: but where the writing is only required as evidence, and where the obligation might be proved without writing, the acknowledgment is sufficient.”(r)

Where a deed or writing was required at common law there must be an averment of the writing.(s)

§ 504. A statute raising unsealed writings to the rank of specialties does not affect the manner of pleading; and it is not necessary to describe the writings so as to show that debt or covenant is rightly brought, because the statute referred to applies only to writings promising to pay money or to perform some act or duty, and the memorandum under the Statute of Frauds may be a mere note of facts on which *assumpsit* will lie.(t) Under a

General rule as affected by a statute putting sealed and unsealed writings in the same category.

like statute in Arkansas, to an action on a promissory note a plea was set up that the note was given for the price of land, and that no deed had been tendered, it was held that such a contract should have been in writing, and should have been pleaded with a profert.(u)

(q) *Carpenter v. Lockhart*, 1 Cart. 92; see, however, *Bull v. McCrea*, 8 B. Mon. 423 contra; see *Duncan v. Clements*, 17 Ark. 280; see § 520.

(r) *Sinclair v. Sinclair*, Bell Fol. Ca. 141.

(s) *Hutton v. Hutchins*, 4 Ir. C. L. Rep. 234; *Beely v. Parry*, 3 Lev. 155; *Dayton v. Williams*, 2 Doug. (Mich.) 31 (as a suit on a will).

(t) *Kibby v. Chetwood*, 4 T. B. Mon.

(u) *Duncan v. Clements*, 17 Ark. 280; as to pleading with a profert since the Statute of Frauds, see 7 Peters. Abr. (Am. ed.) p. 473 n.; 1 Saund. 276; 1 Chitt. Pl. 314 (4th ed.)

§ 505. A demurrer will not lie to a declaration which fails to aver a writing, because, as has been seen, a contract within the Statute of Frauds is presumed, in absence of evidence or objection, to have been in writing.^(v) A plea of the Statute of Frauds is good where the complaint does not show whether the contract is oral or written.^(w) And Langdell, in his Summary of Equity Pleading, says that the plea of the statute is always a negative plea, because, if the bill shows the statute to apply and does not aver a writing, the Statute of Frauds is then set up, not by plea but by demurrer.^(x) A demurrer confesses the contract to have been in writing.^(y) So in the case of a trust and in equity.^(z)

A declaration not averring a writing, not demurrable.

Though a declaration need not aver the contract to have been in writing, yet if the plaintiff demurs to a plea of the Statute of Frauds he admits the agreement to have been oral.^(a) So where the plaintiff declared on a special promise relating to land, and the defendant raised the Statute of Frauds by a special demurrer, the plaintiff, by joining in the demurrer, admitted the contract to be verbal.^(b) Even where for other purposes the court may infer the contract in suit to have been an oral one, it will not raise this inference on a question of the sufficiency of the pleadings.^(c)

§ 506. The general doctrine now under consideration is one of pleading, and not peculiar to the Statute of Frauds. Thus it has been held that a declaration does not have to aver that the acceptance of a bill was in writing, though the writing is essential to the validity

General rule above applies outside of the Statute of Frauds.

- (v) *Brennan v. Ford*, 46 Cal. 16; *Clark v. Brown*, 1 Root, 78; *Seymour v. Mitchell*, 2 Root, 145; *Hunt v. Roberts*, 40 Me. 193; *Ecker v. Bohn*, 45 Md. 278; *Ecker v. McAllister*, 45 Md. 302; *Elliott v. Jenness*, 111 Mass. 29; *Parker v. Niggeman*, 6 Mo. App. 547; *Brock v. Becher*, 6 Am. Law Rec. 381; *Capehart v. Hale*, 6 W. Va. 550; *Lamb v. Starr, Deady*, 353.
- (w) *Story*, § 762, citing *Rowe v. 15 Ves. Teed*; *Thring v. Edgar*, 2 S. & S. 274.
- (x) *Page 71*, citing *Dan. Ch. Pl. (5th ed.) 306*, but admitting that *Browne S. of F. (4th ed.)* is contra.
- (y) *Cross v. Everts*, 28 Tex. 531; *First Nat. Bank v. Kinner*, 1 Utah, 102; *See Wood v. Midgeley*, 2 Sm. & Giff. 115.
- (a) *Lamb v. Starr, Deady*, 353, citing cases; see *McNabb v. Nicholl*, 3 U. C. L. J. N. S. 21.
- (b) *Maggs v. Ames*, 1 M. & P. 294; 4 Bingh. 470; *Bentham v. Hardy*, 6 Ir. L. Rep. 183.
- (c) *Mitchell v. King*, 77 Ill. 466.
- (c) *Livingston v. Smith*, 14 How. Pr. 492.

of the acceptance under 1 & 2 Geo. IV. c. 78.(d) In a New York case it was said that there can be no valid oral acceptance of a bill under a statute of that State; therefore it is not necessary to aver that such an acceptance was by writing.(e) So a request by a surety to the creditor to proceed directly against the principal debtor.(f) So, a contract to buy shares of stock.(g) So, an assignment of a chose in action.(h) So, a contract of sale, &c., of gold.(i) So, an acknowledgment waiving the benefit of the Statute of Limitations.(j) So, an assignment of a copyright,(k) or of a patent.(l) So, a contract requiring a stamp need not be averred to have been stamped.(m)

Where a promissory note is averred to be in the defendant's handwriting, it need not be said to have been signed.(n)

§ 507. The following are some examples of the application of the general rule now under consideration. Thus it is not necessary that a declaration should allege that the consideration was stated in a written memorandum of contract.(o) Where, however, the writing is averred and set forth in the pleadings, the rule is otherwise.(p) In Petersdorff's Abridgment it is stated that the consideration of an administrator's promise must, since as before the Statute of Frauds, be averred; for the latter has nothing to do with this point, and the pleadings must show that the promise was upon a consideration on common-law principles.(q) A bill to enforce a trust need not

- (d) *Chalie v. Belsbaw*, 6 Bingh. 529. (m) *Campbell v. Wilcox*, 10 Wall. 421.
 (e) *Bank of Lowville v. Edwards*, 11 How. Pr. 218. (n) *Taylor v. Dobbins*, 1 Stra. 399.
 (f) *Coats v. Swindle*, 55 Mo. 32. (o) *Indiana (State of) v. Woram*, 6 Hill, 36; see *Click v. McAfee*, 7 Porter, 65; see contra, the earlier decisions in *Burnet v. Bisco*, 4 Johns. 235; *Ellis v. Merriman*, 5 B. Mon. 296 (the law of Kentucky, however, not requiring the consideration to be expressed in the memorandum); *Violet v. Patton*, 5 Cranch, 151.
 (g) *Washburn v. Franklin*, 28 Barb. 37. (p) *Corbitt v. Salem Gaslight Co.*, 6 Or. 405.
 (h) *Union Bank v. Tillard*, 26 Md. 451.
 (i) *Taylor v. Patterson*, 5 Or. 123; *Russell v. Swift*, Id. 234.
 (j) *Lynch v. Musgrave*, Hay & J. 829.
 (k) *Barnett v. Glossop*, 1 Bingh. N. C. 633.
 (l) *Marston v. Swett*, 66 N. Y. 206; and see *Horner v. Wood*, 23 N. Y. 350; 15 Barb. 372. (q) 9 Peters. Abr. (Am. ed.) p. 409-10, citing cases.

state it to be in writing.(r) So, in the case of a marriage settlement.(s)

It is not necessary to aver an agency to make a contract relating to land to have been in writing, but neither is it necessary that it be so proved.(t) The extent of the present doctrine as a rule of pleading is illustrated by a case claiming in one count in debt, *i. e.*, the price in money, a sum certain, of a horse; the second on the special contract in *assumpsit* for damages for not conveying land as part of the price of a horse; there is a misjoinder; and the fact that the history of the case showed that the special contract was invalid within the Statute of Frauds, will not do away with the second plea to save the first, because the point of misjoinder is to be settled by the record, and there is nothing there to show but that the special contract was in writing and valid; it is not necessary to aver in the declaration that the contract under the Statute of Frauds was in writing.(u)

Where a bill alleges possession taken under an agreement, a writing will be presumed; and in case of a sale to a railway, this makes the omission of a statement of the price from the memorandum immaterial.(v) As will be seen (§ 540), after verdict a writing will be presumed.(w) Where a question of novation arose, and the declaration said that the plaintiff agreed to accept the defendant instead of a certain third person, it was held that after verdict the discharge of the third person would be implied.(x) In a suit against an administrator, Lord Mansfield said: "It was admitted at the bar that, after verdict, the executor's promise must be taken to have been a promise in writing that there were assets."(y)

§ 508. The doctrine that the writing required by the Statute of Frauds need not be averred, thoroughly established as it is, is not universally admitted. In a case reported in Skinner and in 3 Levinz, since overruled, it was

General rule denied.

(r) McNabb v. Nicholl, 3 U. C. L. J. N. S. 21; Lamb v. Starr, Deady, 353, citing cases.

(s) Harry v. Jones, 4 Price, 97.

(t) Heard v. Pilley, L. R. 4 Ch. App. 551; O'Donnell v. Orfen, Hayes & J. (Ir. Exch.) 190; Fisher v. Bowser, 41 Tex. 223; Hanchett v. McQueen, 32 Mich. 24.

(u) Hinchman v. Rutan, 2 Vroom, 498; S. C. *sub nom.* Rutan v. Hinchman, 1 id. 256.

(v) Patterson v. Buffalo, 17 Grant (U. C.) 523.

(w) Elting v. Vanderlyn, 4 Johns. 237; Foquet v. Moor, 7 Exch. 875.

(x) Roe v. Haugh, 3 Salk. 14.

(y) Hawkes v. Saunders, Cowp. 289.

held that not only was a promise to marry within the Statute of Frauds, but that a declaration which did not aver this was demurrable.(z) So lately as in a decision in 5 Irish Chancery, it was suggested that in a suit for a legacy it was necessary in order to hold an executor *de bonis propriis*, that the declaration should aver and prove a written promise and assets or other consideration.(a)

In New York, in some of the earlier decisions under the Revised Statutes, it was held that the latter makes all the rules of pleading those of the Code itself, and requires "a plain and concise statement of the facts constituting a cause of action;" hence that under the code a guaranty must in the complaint be averred to have been in writing.(b) In another case also in 2 Duer it was held that where a suit was brought for goods ordered by and for the benefit of one M. A. N., it was necessary to aver as well as to prove that M. A. N. was the defendant's agent to accept the goods, being a gift or loan from the defendant to him.(c) In another case the rule of equity was apparently regarded as calling for an averment in the bill of written evidence of a contract within the Statute of Frauds.(d) It has been thought that this was the equity doctrine in England,(e) but under the Judicature Act(f) the equity and common-law rule is now the same.

In North Carolina it has been required that the fraud under which the case is taken out of the Statute of Frauds shall be pleaded in a bill in equity.(g) The rule in equity in some other States also requires the averment in the bill of the written contract.(h) Though the earlier rule was otherwise, now since Code of Prac., § 123, a declaration in Kentucky must aver the contract to have been in writing,(i) and it is only where the declaration

(z) *Philpot v. Wolcot*, Skinner, 24; 3 Lev. 65 (*sub nom.* *Phillpott v. Wallet*).

(a) *Molyneux v. Scott*, 3 Ir. Ch. 295.

(b) *Le Roy v. Shaw*, 2 Duer, 628, distinguishing *Elting v. Vanderlyn* as a case before the Code. See *Thurman v. Stevens*, 2 Duer, 610; *supra*, § 513.

(c) *Smith v. Leland*, 2 Duer, 508.

(d) *Cozine v. Graham*, 2 Paige, Ch. 179, citing *Child v. Godolphin*.

(e) *Fletcher v. Fletcher*, 50 L. J. Rep. Ch. 787. See *Barkworth v. Young*, 4 Drew. 9; 26 L. J. Ch. 153, citing cases

(see, however, *Morgan v. Worthington*, 38 L. T. N. S. 445. See form of bill alleging written contract, *Whitw. Eq. Pr.* *236-9, L. L. vol. 62).

(f) Order XIX. Rule 23; *Fletcher v. Fletcher*, *supra*.

(g) *Streator v. Jones*, 3 Hawks, 434, citing *Hare v. Shearwood*, 1 Ves. Jr. 241. See § 524.

(h) *Underhill v. Allen*, 18 Ark. 466; *Meach v. Perry*, 1 Chip. 182.

(i) *Smith v. Fah*, 15 B. Mon. 443; *Bradley v. Lamb*, Hardin, 527.

does not show the contract to be in writing that the defendant must set up the Statute of Frauds.(j)

A promise to a debtor is not within the guaranty clause of the statute, but this must in Kentucky be alleged by the plaintiff in his petition.(k) A discharge under the new agreement of the person originally liable will take the new agreement out of the guaranty clause of the Statute of Frauds, but this must be averred or the complaint will be demurrable.(l)

§ 509. Under the Code of Practice of Kentucky, an averment of an agreement will be taken to mean an oral agreement; and even though no defence of the Statute of Frauds is made, judgment cannot be given for the plaintiff.(m) The general rule affected by special statutes; and examples. Written evidence, if not averred in the declaration, cannot be received.(n) Even though a record.(o) A complaint must state not only that a sheriff signed a memorandum of sale, but that the memorandum was incorporated in the return to the execution.(p) Contrary to the rule given above, § 501, it has been held that the consideration of a written agreement must be averred in the *narr.*(q)

In the case of a collateral promise it was held in Oregon that the plaintiff should declare specially, and should aver the consideration of the contract.(r) Averring a consideration is really, however, a different point from averring a writing, for the declaration must show a valid contract; and at common law a consideration was necessary to all contracts not under seal.(s) As is seen in § 504, where all writings are made to rank as specialties, it has been held that, like a deed at common law, a writing under the Statute of Frauds must be pleaded with a *profert.*(t) And a plea not stating whether the contract was oral or written implies the lat-

(j) *Smith v. Fah*, *supra*.

(k) *Davis v. Wiley*, 3 Kent. L. Reporter, 755 (S. C. Ky.)

(l) *Bason v. Hughart*, 2 Tex. 480. That the declaration on an oral guaranty must be special, see *Wagnon v. Clay*, 1 A. K. Marsh. 257; *Runde v. Runde*, 59 Ill. 98; *Elder v. Warfield*, 7 Harr. & Johns. 396.

(m) *Hocker v. Gentry*, 3 Metc. (Ky.) 474, citing *Smith v. Fah*.

(n) *Byamsee v. Reese*, 4 Metc. (Ky.) 372.

(o) *Id.*

(p) *Linn Boyd Co. v. Terrill*, 13 Bush, 464.

(q) *People v. Howel*, 4 Johns. 296; and see *infra*.

(r) *Hayden v. Steadman*, 3 Or. 550; see "Guaranty."

(s) *Connolly v. Cottle*, Breese, 287; see *Lang v. Nevill*, 6 Jur. 217; *Roller v. Ott*, 14 Kan. 615.

(t) *Duncan v. Clements*, 17 Ark. 280.

ter, and a demurrer will be sustained because there should have been a profert.(u)

In Maine the writing *semble* must be averred.(v) Under a statute of Maine no action will lie against an executor on a claim against the estate unless a written claim had first been presented him, and this must be averred by the plaintiff.(w) In Indiana since the Code of 1843 it is necessary in suit upon a written contract to file the latter, or a copy of it, as the foundation of the action, and therefore in cases within the Statute of Frauds, if the contract is not averred to have been in writing it will be presumed to be oral, and the complaint is bad on demurrer.(x) Though the pleading can be, *semble*, amended if there is in fact a writing.(y) In another case the court said that at common law where a cause of action required "by the Statute of Frauds to be in writing was declared on, it was not necessary to show in the declaration that the contract was in writing. But under our Code, if the contract, or a copy of it, is not filed with the complaint it will be presumed that the contract was not in writing, and the pleading setting up a contract in such a case will be held defective on demurrer, unless it show that there was such a writing as required by the statute. If, then, the complaint were to be viewed as setting up and relying upon the express trust only, we should be compelled to hold it bad."(z) In another case it was held, however, that a special verdict finding a writing, and a general verdict, both for the plaintiff, are not necessarily inconsistent, because, though the plaintiff's failure to aver the writing would give rise to a presumption that the contract was oral, yet the defendant might waive the point of the Statute of Frauds; and a rule, therefore, requiring the special verdict to be for the defendant, and the general verdict only to stand for the plaintiff, was

(u) *McDermott v. Cable*, 23 Ark. 202.

(v) *Hunt v. Roberts*, 40 Me. 196; R. Sc. 96, § 107.

(w) *Stevens v. Haskell*, 72 Me. 245.

(x) *Cook v. Anderson*, 20 Ind. 17; *Flenner v. Flenner*, 29 Ind. 589; *West. Un. Tel. Co. v. Hopkins*, 49 Ind. 226.

(y) *Id.*

(z) *Musselman v. Kent*, 33 Ind. 456. See *Booker v. Ray*, 17 Ind. 522; *Drake v. Markle*, 21 Ind. 435; *Peoria Ins. Co. v. Walser*, 22 Ind. 81; *Harper v.*

Miller, 27 Ind. 281; *Livesey v. Livesey*, 30 Ind. 398; *Crosby v. Jerolman*, 37 Ind. 270; *King v. Enterprise Ins. Co.*, 45 Ind. 54; *Berkshire v. Young*, id. 465; *Beach v. Jones*, 50 Ind. 531; *Logansport R. R. v. Wray*, 52 Ind. 578; *Langford v. Freeman*, 60 Ind. 50; *Goodrich v. Johnson*, 66 Ind. 262; *Baynes v. Chastain*, 68 Ind. 380; *Krohn v. Banta*, 68 Ind. 278; *Neal v. Neal*, 69 Ind. 422.

held to be correct, even if the two verdicts for the plaintiff were inconsistent.(a)

In Missouri it has been held that an acceptance of a writing must be by writing, and must be so averred.(b) Where an action is brought upon a contract not pleaded as in writing, the defendant denies generally and pleads the Statute of Frauds, and the plaintiff replies, setting up a writing as an exhibit; the exhibit, not being set out as a foundation of the suit, is properly excluded.(c) In Colorado it has been held that where a writing is relied upon and a contemporaneous modification of it, the latter must in the pleadings be averred to have been in writing.(d) In Arkansas a bill for specific performance must aver the contract to have been in writing or that there was part performance.(e)

§ 510. Where it appears on the face of the pleadings that the contract is oral and within the Statute of Frauds a demurrer is proper.(f) It is usual, however, to set up the Statute of Frauds by plea rather than demurrer, as the bill rarely discloses all that is necessary for the defendant's case.(g)

When
pleadings
are demur-
rable.

(a) *Logansport R. R. v. Wray*, 52 Ind. 578.

(b) *Rousch v. Duff*, 35 Mo. 314.

(c) *Miller v. Grand Grove*, 9 Mo. App. 585.

(d) *Peddie v. Donnelly*, 1 Colorado, 423; see *Whittier v. Dana*, 10 Allen, 326.

(e) *Underhill v. Allen*, 18 Ark. 466.

(f) *Whitbread v. Brockhurst*, 1 Bro. C. C. 404 (the Statute of Frauds being a public statute); *Wood v. Midgeley*, 2 Sm. & G. 115; *Randall v. Howard*, 2 Black, 585; *Bolling v. Munchus*, 65 Ala. 561; *McDougall v. Banks*, 13 Ga. 452; *Black v. Black*, 15 Ga. 445; *Switzer v. Skiles*, 8 Ill. 529; *Sands v. Thompson*, 43 Ind. 21; *Mather v. Scoles*, 35 Ind. 3; *Sobey v. Brisbee*, 20 Iowa, 106; *Linn Boyd Co. v. Terrill*, 13 Bush, 464; *Farnham v. Clements*, 51 Me. 427; *Lawrence v. Chase*, 54 Me. 196; *Walker v. Locke*, 5 Cush. 90; *Black v. Black*, 109 Mass. 499; *Elliott v. Jenness*, 111 Mass. 29;

Campbell v. Brown, 129 Mass. 26; *Hanchett v. McQueen*, 32 Mich. 22; *Box v. Stanford*, 13 Sm. & M. 96; *Payson v. West*, Walker's Rep. 515; *Gardner v. Armstrong*, 31 Mo. 539; *Chambers v. Lecompte*, 9 Mo. 575; *Donaldson v. Newnan*, 9 Mo. App. 242; *Cozine v. Graham*, 2 Paige, Ch. 177 (before 1852); *Amburger v. Marvin*, 4 E. D. Smith, 393 (since 1852 see § 521); *Young v. Young*, 81 N. Car. 98; *Hammer v. McEldowney*, 46 Pa. St. 336; *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 442, 454; *Garner v. Stubblefield*, 5 Tex. 560.

(g) *Dan. Ch. Pl. & Pr.* 561. In *Barton's Ch. Pr.* 351, 377, it is said that where the memorandum shows no signature, or where there is no sufficient part performance alleged, a demurrer is proper, a plea being the usual mode of setting up the defence of the statute; see *Lead. Cas. in Eq.* vol. 1, Pt. 2, p. 1042.

In a Mississippi case it was said^(a) "that a party may admit the parol agreement in his answer, and yet insist on the statute; it is the same thing" (i. e., when the complaint shows the contract to have been oral), "to demur, thereby admitting the facts, but denying the right to relief."^(b) So where the memorandum evidencing the contract is set forth in the pleadings and appears manifestly insufficient to satisfy the statute. Thus a complaint alleged that defendants signed said note as sureties, &c., and became, &c., original parties thereto and joint makers by endorsement of their names, &c., at the time of the execution thereof and before the delivery of the same to plaintiff, and the note was irregularly endorsed by the defendants. It was held, on demurrer, that the memorandum as pleaded was insufficient.⁽ⁱ⁾

A general demurrer is proper where the bill showed a codicil not properly attested; the Statute of Frauds does not have to be expressly referred to.^(j) Where, in a bill for specific performance, letters are set out in the bill as the agreement, if they fail to do this the plaintiff cannot recover. If they are set out only as evidence of the agreement, the plaintiff cannot give parol proof if the defendant insists upon the Statute of Frauds.^(k) An allegation relating to a contract of sale which is merely that the defendants on a certain day, and repeatedly since, notified the plaintiff that they would, if he requested it, reconvey the land to him, implies a parol agreement and can be taken advantage of by demurring.^(l) *Seem*, the use of the word agreement has been held to imply an oral one.^(m)

Where it is fairly to be inferred from the averments in the petition that the agreement sued on was not in writing, the Statute of Frauds may be availed of by demurrer.⁽ⁿ⁾ Where a bill for the specific performance of a contract of lease stated in writing, signed by the defendant, agreeing to give the lease "subject to certain agreements to be drawn up and signed immediately," a plea of the Statute of Frauds averring that the defendant did not sign any lease or agreement, &c., subsequently to the above memorandum, is good.^(o) This

(a) *Box v. Stanford*, 13 Sm. & M. 96. (m) *Hocker v. Gentry*, 3 Metc. (Ky.)

(i) *Van Doren v. Tjader*, 1 Nev. 388; 474, at least in Kentucky; see § 508 n. (l).
see *Joseph v. Holt*, 37 Cal. 250. (n) *Howard v. Brower*, 37 Ohio St.

(j) *Middlebrook v. Bromley*, 11 W. 407.

R. 712; 9 Jur. N. S. 614.

(k) *Birce v. Bletchley*, 6 Mad. 17.

(l) *Ahrend v. Odiorne*, 118 Mass. 268. v. Turnour.

(o) *Sansom v. Prole*, 12 L. J. Ch. 26, distinguishing and explaining *Morison*

decision amounts to saying that a plea is good which avers that there is no such writing as the bill itself shows to be necessary.

Where a written contract as set forth in the pleadings shows no consideration, a demurrer is proper, just as where the pleadings show that a contract within the Statute of Frauds has not been put into writing.(p) Where the declaration was upon a contract bearing ten per cent. interest (which contract required a writing), if the plaintiff strikes out the words ten per cent., a demurrer not specially showing as ground of demurrer the want of a writing will not be sustained.(q) Where a bill in equity states that M. said so and so, an oral contract is indicated.(r)

In pleading, the term "parol" will be treated as meaning "verbal" if no writing is adduced; and without a suggestion made of existence of a writing, no leave to amend will be given.(s)

A complaint is sufficient which, though not expressly alleging it, implied that the goods in suit were delivered to the defendant, who paid part of the price, the word used was "bought." (t) On a demurrer to the complaint it was held that an averment that the parol agreement was executed is sufficient to meet the Statute of Frauds, because the word "executed" implies that the contract is no longer in parol.(u) A demurrer alleging that a *cestui que trust* sold land and directed the trustee to convey, admits an agreement in writing for the sale and conveyance of the land.(v)

A novation was declared on and it was stated that the original debtor was acquitted and discharged; this is a sufficient statement and will imply a legal discharge, and the Statute of Frauds does not apply.(w) "Assign," "transfer," in legal proceedings, mean written transfer, and a plea using these terms will be held to imply the existence of a writing.(x) Where the complaint alleges a contract, the latter will be presumed to be in writing; and an answer which avers the same contract and adds that the plaintiff said

(p) *Wilson Sewing Mach. Co. v. Schnell*, 20 Minn. 40; *Clancy v. Piggott*, 4 N. & M. 502; 2 A. & Ell. 473.

(q) *Matlock v. Purefoy*, 18 Ark. 493; see *Hall v. King*, 2 Col. 718.

(r) *Macey v. Childress*, 2 Tenn. Ch. 442.

(s) *Yarborough v. West*, 10 Ga. 473.

(t) *Winslow v. Bradley*, 15 Wis. 393, 394.

(u) *Shank v. Teeple*, 33 Ia. 192.

(v) *Richards v. Richards*, 9 Gray, 313.

(w) *Kissock v. Woodward*, 1 U. C. K. B. 345, distinguishing *Cuxon v. Chadley* as a case where the original debtor was not discharged.

(x) *Andrews v. Carr*, 26 Miss. 578.

that he would deliver it in writing, does not destroy this presumption.(y)

Under the Code of Wisconsin it is sufficient that a complaint states that an agreement was "executed"; it need not state it to be "subscribed."^(z) The Statute of Frauds can be set up by demurrer as well as by plea or answer, and Kindersley, V. C., expressed himself as never satisfied with the objection once prevailing thereto. Where a bill states simply an agreement, without saying that it is in writing, a demurrer is proper on the supposition that a verbal agreement is meant. That where a bill states an agreement to be in writing it is unnecessary to say that it was signed, for otherwise it would not be an agreement in writing.(a) And in any event it was said that an amendment would be allowed. Since the Judicature Act, the Statute of Frauds cannot be set up by demurrer.(b) To covenant on an indenture a plea that the deed was not signed is bad, because an allegation of demise by indenture implies an execution by the plaintiff.(c)

Where a bill was filed by the vendor to compel specific performance, and it stated that an agreement reduced to writing, but not that it was signed by the parties, a general demurrer was overruled, and the signature will be presumed until the contrary is shown. *Seemle*, the decision will give the benefit of the statute, when it appears *negatively* on the face of the bill that the requisites of the Statute of Frauds have not been complied with.(d) In a case before the Master of the Rolls, a general demurrer was overruled, because, though it did not appear from the face of the bill that the agreement was signed in the manner required by the Statute of Frauds, yet the statements are quite consistent with there being such a signature.(e)

In California, even when the bill states an oral contract, a gen-

(y) *Marston v. Swett*, 66 N. Y. 206, citing cases.

(z) *Cheney v. Cook*, 7 Wis. 423.

(a) *Barkworth v. Young*, 4 Drew. 9, 26 L. J. Ch. 153, citing *Wood v. Midgeley*, 5 DeG. M. & G. 41, and *Rist v. Hobson*, 1 S. & S. 543.

(b) *Morgan v. Worthington*, 38 L. T. N. S. 445; see *Catling v. King*, 5 Ch. D. 660.

(c) *Aveline v. Whisson*, 4 Mann & G. 804.

(d) *Rist v. Hobson*, 1 S. & S. 543, 2 L. J. Ch. 86 (the better report); see note citing *Whitchurch v. Bevis*; *Redding v. Wilkes*; as to setting up the Statute of Frauds by way of demurrer.

(e) *Field v. Hutchinson*, 1 Beavan, 599.

eral demurrer will not always lie, and where an oral trust is suggested in the bill the plaintiff is entitled to an answer to his allegation.(f) A demurrer which recites the contents of the bill, so as to show that there is no sufficient averment therein of the writing required by the Statute of Frauds, is not ill as a speaking demurrer.(g) Where the demurrer is good because the bill shows the contract to have been in writing, a plea would be bad.(h)

Under the New York Code (1852) Pt. III. c. 4, §§ 156, 143, 149, the defendant must either demur to the statement, if the latter does not show sufficient ground for recovery, or he must deny the facts contained in the statement, or he must state the facts on which he relies for his defence. Before the Code he might have demurred when the bill showed the Statute of Frauds to apply, or he might have set up the statute in his answer, but since the Code he cannot.(i)

§ 511. Where part performance is relied upon in equity to avail instead of a writing, it is a question how far it is necessary for the party claiming the benefit of the part performance to aver it in his pleadings. It has been decided that where the answer sets up the Statute of Frauds, the part performance must be averred in the bill.(j) And in a Maryland case it was said that if there is no allegation of part performance, evidence thereof is not admissible.(k) So an answer relying on a contract admitted to be oral, but part performance of which latter was described, is not demurrable.(l) Where it was held that if a contract relating to lands be executed by one party, the contract itself and the performance may be proved notwithstanding the Statute of Frauds, and a court of chancery will either decree specific performance or the return of the money expended; it was also held

Pleading a
part per-
formance.

(f) *Peralta v. Castro*, 6 Cal. 358.

(g) *Wood v. Midgeley*, 2 Sm. & G. 115; *Howard v. Okeover*, 3 Swanst. 421.

(h) *Black v. Black*, 15 Ga. 445; see *semble*, *Amburger v. Marvin*, 4 E. D. Smith, 393, that the defendant, without pleading or demurring, can object at the trial that the complaint shows an oral contract within the Statute of Frauds.

(i) Will. Eq. Jur. 282; see § 531.

(j) *Meach v. Perry*, 1 D. Chip. 182;

Cady v. Caldwell, 5 Day, 67; *Wood v. Jones*, 35 Tex. 64; *Van Dyne v. Vreeland*, 3 Stockt. Ch. 378; see *Whitw. Eq. Prec. (L. L. vol. 62) p. *238-9*.

(k) *Small v. Owings*, 1 Md. Ch. Dec. 363; see *Black v. Black*, 15 Ga. 450; *Bomier v. Caldwell*, 8 Mich. 474; *Harr. Ch. 67*.

(l) *Arguello v. Edinger*, 10 Cal. 158, citing cases.

that the contract and the performance of it and notice to all parties to be affected must be stated and proved as stated.(m)

A purchaser asking the specific performance of a parol contract for the sale of land, must aver in his bill the facts showing a full compliance on his part with all the stipulations of the contract, and that a general allegation "that he has offered, and has always been ready and willing to comply with his contract," not stating the facts, was not sufficient; with cases cited.(n) But it has been said that an averment of willingness to perform is not necessary, this being inferred from the fact of bringing the bill.(o)

Where acts of part performance are relied on to entitle the plaintiff to a specific execution, he should allege the fact either in the original bill, or after the plea or answer, in an amendment.(p) Where part performance is relied on in the bill, but the contract as stated by the defendant is different from that averred in the bill, the plaintiff, if wishing to adopt the latter version, must file an amended bill admitting the truth of the defendant's statement, and asserting that the part performance alleged in the bill was under the latter contract.(q) So it has been held in Massachusetts that a plaintiff in equity failing for want of a sufficient memorandum must, if he wishes to rely on part performance, bring a new bill.(r)

Where, in answer to a bill for partition, a special contract is set up, and the plaintiff's bill asserts that the contract is oral and that there has been no part performance, the defendant must file a cross-bill, and aver and prove part performance.(s) In Iowa a demurrer will lie to a complaint, alleging a parol contract within the Statute of Frauds, and not alleging that the complainant proposed to prove it by the testimony of the defendant, or in some like way.(t) So a demurrer is proper, where the bill alleges an oral contract and certain part performance, and the latter is insufficient; a plea is also good under the circumstances.(u)

(m) *Cady v. Caldwell*, 5 Day, 67.

(n) *Hart v. McClellan*, 41 Ala. 251.

(o) *Hatcher v. Hatcher*, 1 McMull. Eq. 317.

(p) *Capehart v. Hale*, 6 W. Va. 550.

(q) *Willis v. Evans*, 2 B. & B. 228; see *Mortimer v. Orchard*, 2 Ves. Jr. 243.

(r) *Whelan v. Sullivan*, 102 Mass. 206.

(s) *Oliver v. Jernigan*, 46 Ala. 43;

for a sufficient statement of part performance, see *Magruder v. Campbell*, 40 Ala. 622; *Lee v. Boutwell*, 44 Tex. 153.

(t) *Babcock v. Meek*, 45 Ia. 137; see Ia. Code, §§ 3663, 3666-7, 2648.

(u) *Whitchurch v. Bevis*, 2 Bro. C. C. 568; see *infra*.

If the bill alleges such a part performance as will take the agreement out of the statute, the demurrer is such an admission of the part performance as will preclude the defendant from the benefit of the statute. The bill must state the facts which are relied upon as part performance. When the facts are admitted by the demurrer, the court must determine whether the facts relied upon do constitute part performance.^(v) In Michigan it has been held that where an oral contract relating to land and partly performed is sought to be specifically enforced, this should be averred in substance.^(w)

§ 512. In Indiana it was held at one time not to be necessary to allege those acts which avail instead of a writing to satisfy the Statute of Frauds. Thus, where there has been part payment in the case of a sale of goods, the complaint does not have to aver this;^(x) and this, though by statute in that State it is necessary to aver a writing if one exists, and if a contract within the Statute of Frauds is not averred to be in writing, and a copy, &c., is not filed, the presumption is that it was oral, and a demurrer is proper; but if it might have been good by parol, as where there is part payment under a contract of sale of goods, the objection cannot be raised by demurrer.^(y) But this view seems now to have been given up, and it has been held that a complaint which shows an oral contract, and does not show part performance or a fraudulent refusal to reduce the contract to writing, is bad.^(z)

In a late Indiana case, discussing the rule afterwards changed by statute in that State, that a pleading need not aver a contract within the Statute of Frauds to be in writing, the court said: "We apprehend the true principle to have been this, that where the declaration counted upon a contract within the Statute of Frauds, not alleging it to have been by parol, and not alleging any matter that would take it out of the statute, the declaration would have been good *because* the contract alleged may have been in writing, and *not because* there may have been other matters not alleged that

(v) *Van Dyne v. Vreeland*, 3 Stockt. Ch. 378; 1 Beasl. 150.

(y) *Western Union Tel. Co. v. Hopkins*, 49 Ind. 226.

(w) *Brown v. Brown*, 47 Mich. 378.

(z) *Mather v. Scoles*, 35 Ind. 3; see

(z) *Harper v. Miller*, 27 Ind. 281; *Estep v. Burke*, 19 Ind. 87.

see *Cook v. Anderson*, 20 Ind. 17.

would take the contract out of the statute; and that this is all that is meant when it is said that the statute has not changed the rule of pleading, and furnishes only a rule of evidence.

"We think it clear that, as the contract sued upon must be taken to have been a verbal and not a written one, neither the original nor a copy having been set out as required by the Code if in writing, the plaintiff could not give in evidence a written one in support of his complaint. The complaint, therefore, cannot be held good on the theory that prevailed before the code, that the contract may have been a written one.

"The contract thus appearing to have been a verbal one, and within the statute, and therefore invalid, unless the purchaser has received a part of the goods, or has given something in earnest to bind the bargain, or in part payment, the question arises whether the complaint is good without averring the existence of some of those facts that would take the contract out of the statute. On the denial of such complaint, the plaintiff would be required, doubtless, to prove the existence of some of the facts that would take the contract out of the statute, in order to entitle himself to recover. He could not recover by proving merely what he had alleged, the making and breaking of the parol contract by the defendant. And, if such complaint were to be held good, it would be contrary to fundamental principles of pleading and practice, which require a party to allege facts sufficient to constitute a cause of action, and to prove only that which he has alleged.

"We are of opinion, for these reasons, that a complaint on a parol contract within the section of the Statute of Frauds, which does not show that the purchaser has received part of the property, or given something in earnest to bind the bargain or in part payment, does not state facts sufficient to constitute a cause of action, and that a demurrer thereto for want of sufficient facts ought to be sustained. This was so held in a case cited from Paige, where the court said: 'If the agreement, as stated in the bill, appears to be a parol agreement only, and no sufficient grounds are alleged to take the case out of the statute, the defendant may by demurrer object to any relief founded thereon.'"(a)

(a) Krohn v. Bantz, 68 Ind. 278, overruling Harper v. Miller; see this case for an insufficient statement of part performance of a contract relating to chattels.

§ 513. The charge of fraud must be distinctly made in the case of a constructive trust.(b) When a case of fraud is made by the bill, the facts must be distinctly averred in order to let in oral evidence.(c) The charge of fraud.

Where the time of performance of a written contract has been enlarged by an oral agreement, the plaintiff should aver the written contract; and if the defendant has not complied with the terms of the oral alteration, he the defendant cannot make use of the latter as a defence.(d) An oral contract for the sale of land sought to be enforced, ought to be set out in the pleadings with great distinctness and certainty.(e)

§ 514. It has long been a subject of doubt as to whether a defendant who relies upon a contract within the Statute of Frauds must not aver the contract to be in writing. The defendant must aver a writing. In an early case it was said in England that, though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads it in bar, he must plead it so that it may appear to the court that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.(f) To *assumpsit* on a written guaranty the defendant pleaded, among other pleas, a special plea setting out that the guaranty was given solely on the representation that it was for a special purpose; *semble* that the plea, not stating whether the contract so pleaded was in writing or not, was demurrable, but the plaintiff by replying generally waived the defect.(g)

A plea to a suit on a promissory note that the plaintiff was to take certain land in payment, is demurrable if it does not allege such a contract to have been in writing.(h) In a case in 31 Ohio State, the court said that "Before the adoption of the Code the

(b) *Meach v. Perry*, 1 D. Chip. 182; *Robson v. Harwell*, 6 Ga. 589; see (Lord) *Walpole v. (Lord) Orford*, 3 Ves. 402.

(c) *Miller v. Cotten*, 5 Ga. 340; *Robson v. Howell*, 6 id. 596; see *Tiernan v. Granger*, 65 Ill. 354.

(d) *Whittier v. Dana*, 10 Allen, 326; see *Peddle v. Donnelly*, 1 Col. 423. *Vide supra*.

(e) *Magruder v. Campbell*, 40 Ala. 622.

(f) *Case v. Barber*, T. Raym. 450; see *Massey v. Johnson*, 1 W. H. & G. 255; see *Mans. on Demurrer*, L. L. vol. 26, p. *1vi-lvii; *Wms. Saund.* (Sir E. V. Will. ed.) 394 n. and 231 n.; *Gould*, Pl. § 46, p. 193.

(g) *Galley v. Taylor*, 2 C. & K. 552.

(h) *Moore v. Sullivan*, 21 U. C. Q. B. 446.

practice was settled, that an agreement or promise required to be in writing might be declared on generally in a declaration; but a plea was required to be more definite and certain, and to show that the promise was in writing. We know of no good reason for departing from this rule; there is nothing in the Code that requires it, and to reject or relax it would be to sanction a looseness in pleading becoming altogether too prevalent.”(i) Though the rule in Missouri is that the plea must aver a writing,(j) yet, where a contract within the Statute of Frauds is pleaded as a defence, the plaintiff’s replication must be properly pleaded, though, *semble*, the plea did not aver a writing.(k)

Speaking of a contract not affected by the Statute of Frauds, the Supreme Court of New Hampshire in an early case said that “The contract to give time is not averred to have been in writing; and we have no doubt that it must be considered in this plea as a contract not in writing.”(l)

§ 515. The rule requiring in a plea an averment of a written contract, while being admitted, has been questioned, and the reason said not to be obvious.(m) In an Idaho case it was said that an answer setting up a contract within the Statute of Frauds implies that it was written, because if not written it was not valid.(n)

A distinction has been made between a mere defence and a cross-action and set-off, and the latter are regarded as in the nature of an actor’s pleading, and therefore not required to aver a written contract.(o) In a case in Barbour the court said: “I am inclined to think, that where a recovery is attempted to be resisted by inter-

(i) *Reinheimer v. Carter*, 31 Ohio St. 586, citing *Headington v. Neff*, 7 Ohio, 229; *Steph. on Plead.* 331; *Duppa v. Mayo*, 1 Saund. 275 c. note; 1 Chitt. Pl. (16 Am. ed) 257, 310; *McCulloch v. Tapp*, 4 West. L. Monthly, 575 (Ohio); *Brock v. Becher*, 6 Am. Law Rec. 381 (S. C. Ohio), citing cases; see *Lehow v. Pierce*, 9 Chic. Leg. News, 403 (S. C. Col.); see *Kizer v. Lock*, 9 Ala. 269, citing *Brown v. Barnes*; see *Summerall v. Thoms*, 3 Flor. 307.

(j) *Galway v. Shields*, 66 Mo. 313; 1 Mo. App. 549.

(k) *Dinkel v. Gundelfinger*, 35 Mo. 172.

(l) *Grafton Bank v. Woodward*, 5 N. H. 107, citing *Case v. Barber*, T. Ray. 450; *T. Jones*, 158, S. C.; 1 Saund. 276 a, note 2; *Buller’s N. P.* 279.

(m) *Dayton v. Williams*, 2 Doug. Mich. 31; *Dewey v. Hoag*, 15 Barb. 368.

(n) *Bowman v. Ainslie*, 1 Idaho, 645.

(o) *Lehow v. Pierce*, 9 Chic. Leg. News, 403; *Carlisle v. Brennan*, 67 Ind. 18; *Lehow v. Simonton*, 3 Col. 346; *Bowman v. Ainslie*, 1 Idaho, 645.

posing an equitable counter-claim in the nature of a cross-bill, the ordinary mode of stating the agreement in a bill of complaint in chancery is sufficient.”(p)

A late Ohio decision, admitting the general rule, held that “In the case at bar the answer is not in the nature of a plea. It is not a denial of any specific or general allegation in the petition, but confesses all its charges and seeks to recoup from the sum claimed to be due by reason of a collateral contract not recited in the petition. In this respect it is not an answer, but a cross-petition or counter-claim. The averment contained in it that there was such a contract is therefore to be treated as the count of a declaration, and not the averment of a plea.” The plaintiff was foreclosing a mortgage; the defence alleged the breach by the plaintiff of a totally independent contract.(q) Where a plea sets up a defence which is only valid when the agreement is written, it will be assumed on demurrer that such was the case.(r) The general rule has been denied, and the plea not averring the contract to be in writing, is not demurrable any more than the declaration.(s) An answer stating that the defendant, a surety, requested the plaintiff to proceed against the principal, need not aver that such request was in writing as required by statute.(t)

§ 516. The general issue is a sufficient assertion of the defence of the Statute of Frauds, and the latter need not be specially pleaded.(u)

General
issue suffi-
cient asser-

- (p) *Dewey v. Hoag*, 15 Barb. 368. C. Q. B. 170; *May v. Sloan*, 101 U. S. S. C. 237; *Wynne v. Garland*, 19 Ark. 34; *McDonald v. Mission View Association*, 51 Cal. 212; *Ruggles v. Gattton*, 50 Ill. 414; *Meyers v. Schemp*, 67 Ill. 471; *Durant v. Rogers*, 71 Ill. 124; see *Vail v. Hatton*, 14 Ind. 344; *Goff v. Rogers*, 71 Ind. 462; *Hunt v. Ooe*, 15 Iowa, 197; *Suman v. Springgate*, 67 Ind. 122; *Wiswell v. Tefft*, 5 Kan. 266; *Larimer v. Kelley*, 10 Kan. 298; *Talbot v. Bowen*, 1 A. K. Marsh. 436; *Graves v. Dugan*, 6 Dana, 336; *Hocker v. Gentry*, 3 Metc. (Ky.) 474; *Watkins v. McDonough*, 2 Martin, 154; *Wells v. Hunter*, 5 Martin, N. S. 121; *Hall v. Hall*, 1 Gill, 387; *Harrison v.*
- (q) *Brock v. Becher*, 6 Am. Law Rec. 381.
- (r) *Young v. Ansten*, L. R. 4 C. P. 557, citing *Foquet v. Moor*. (This was before the Judicature Act.)
- (s) *Kilroy v. Simkins*, 26 U. C. C. P. 287, citing *Dalgleish v. Conboy*, Id. 258.
- (t) *Coats v. Swindle*, 55 Mo. 32.
- (u) *Jordan v. Money*, 5 H. L. C. 216; *Burnard v. Nerot*, 1 C. & P. 580; *Johnson v. Dodgson*, 2 M. & W. 653; *Elliott v. Thomas*, 3 M. & W. 176; *Fricke v. Tomlinson*, 1 M. & G., 772; *Buttemere v. Hayes*, 5 M. & W. 456; *Maggs v. Ames*, 1 Moo. & P. 294, 4 Bing. 470; *Evans v. Robinson*, 16 U.

tion of the
defence of
the statute;
when the
objection
must be
made.

The contract having been denied, the plaintiff must establish it by competent proof; and if in cases within the Statute of Frauds he offers oral evidence, the latter can be objected to.^(v) As Lord Abinger has said, when by law one cannot make a particular contract, except in writing, to deny the writing is to deny the contract.^(w)

The objection of the Statute of Frauds must be made when the oral evidence is offered, and not later.^(x)

Special pleading under the Hilary Rules was required only of such matters as are peculiarly part of the defendant's case alone, such as fraud, usury, &c., and not matters which must be proved by the plaintiff.^(y) A plea alleging that the representation set out in the declaration was not in writing within 9 Geo. IV., c. 14, § 6, was on special demurrer held to be bad as amounting to a denial of the contract.^(z)

Harrison, 1 Md. Ch. Dec. 335; Billingslea v. Ward, 33 Md. 51; Semmes v. Worthington, 38 Md. 327; Wilson v. Wilson, 6 Mich. 13; Hook v. Turner, 22 Mo. 334; Walker v. Hill, 6 C. E. Green, 191; Jervis v. Smith, Hoff. Ch. 470; Ontario Bank v. Root, 3 Paige, Ch. 481; Coles v. Bowne, 10 Paige, Ch. 535; Harris v. Knickerbacker, 5 Wend. 638; Reynolds v. Dunkirk &c. R. R., 17 Barb. 615; Haight v. Child, 34 Barb. 191; Blanck v. Little, 19 Reporter, 151, 9 Daly, 268; Bonham v. Craig, 80 N. Car. 228; Gulley v. Macy, 84 N. Car. 441; Birchell v. Neaster, 36 Ohio St. 337; Parrish v. Koons, 1 Parsons' Eq. Cas. 84, 85; Poag v. Sandifer, 5 Rich. Eq. 180; Ellis v. Ellis, 1 Dev. Eq. 341; Askew v. Poyas, 2 Des. 145; Patton v. Rucker, 29 Tex. 407; Rowton v. Rowton, 1 Hen. & Mun. 98; Henderson v. Hudson, 1 Munford, 515; Adams v. Patrick, 30 Vt. 516; Whiting v. Gould, 2 Wis. 593.

^(v) Coles v. Bowne, 10 Paige, Ch. 535; Gibbs v. Nash, 4 Barb. 451; Reynolds v. Dunkirk, 17 Barb. 613; Champlin v. Parish, 11 Paige, Ch. 405;

Walker v. Hill, 7 C. E. Green, 519; Whiting v. Gould, 2 Wis. 593, citing cases; Metcalf v. Brandon, 12 Reporter, 52 (S. C. Miss.); League v. Davis, 53 Tex. 14; Morrison v. Baker, 81 N. Car. 80.

^(w) Johnson v. Dodgson, 2 M. & W. 653.

^(x) League v. Davis, 53 Tex. 14; Davidson v. Graves, Ril. Eq. 231; Eiseley v. Malchow, 9 Neb. 179; see LeBlanc v. Victor, 6 Mart. N. S. 256; 3 La. 47; Hay v. Boyd, 3 Mur. (Scotch) 19; see § 539 *et seq.*

^(y) Hil. T. 4 Will. IV., 3 L. J. N. S., before K. B. Reports, 5 B. & Ad. App.; Buttemere v. Hayes, 5 M. & W. 456; Leaf v. Tuton, 10 M. & W. 393.

^(z) Turnley v. MacGregor, 6 M. & G. 58, citing Leaf v. Tuton, 10 M. & W. 393; Buttemere v. Hayes, 5 M. & W. 456. The editor of 6 M. & G. makes an ingenious distinction between the 4th and 17th sections of the Statute of Frauds, suggesting that the phraseology of 9 Geo. IV. c. 14, § 6, is the same as that of the 4th section of 29 Car. II., argues that Buttemere v. Hayes being in a case under the 4th section, where the

§ 517. It may be said that prior to the Judicature Act it was settled law in England, that a special plea of the Statute of Frauds was bad on special demurrer as amounting to the general issue.^(a)

Special plea
of the
Statute of
Frauds bad
on special
demurrer.

A general issue and a plea that the 17th and 4th sections of the Statute of Frauds applied are not good together; there can be but one plea of the statute.^(b) It has been held, however, that where the answer denies the contract and a plea avers that there was no writing under the Statute of Frauds, the plea is overruled by the answer, and the plaintiff must produce written evidence or fail.^(c) In an Ohio case it was said that two answers may be filed, one denying the contract and the other setting up the Statute of Frauds.^(d)

Where a declaration avers a contract, and the defendant by a plea avers a contract stated to be oral, and sets up the Statute of Frauds, a general demurrer to the plea admits the contract averred in the plea to be an inseverable part of that averred in the declaration, and admits that it was oral, and therefore judgment on the demurrer must be for the defendant. Had the plaintiff specially demurred, the plea of the Statute of Frauds would have been ill as amounting to the general issue, but it is good on a general

contract is not avoided as it is under section 17, which was, that in *Leaf v. Tuton* the rule was not the same. If the general issue, in denying the contract, denied by inference that the statute had been complied with, where the contract is void if the rule be not complied with, it does not follow that where, as under section 4, the oral contract is not void but only not enforceable, a denial of the making is by inference a denial that the statute has been complied with. If a compliance with the statute is not denied by inference in the general issue, then a special plea of the statute might seem to be proper and necessary; in *Read v. Nash*, 4 Wils. 305; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Wakeman v. Sutton*, 2 A. & E. 78; *Devaux v. Steinkeller*, 6 Bing. N. C. 84, the Statute of Frauds was pleaded.

As the authorities cited elsewhere in

this chapter show, the distinction above set up has never been acknowledged, and a reference to chapter on "Validity" will show that little or no value is attached, for any purpose, to the difference in language between sections 4 and 17 of the Statute of Frauds.

(a) *Reade v. Lambe*, 2 L. M. & P. 67, citing *Leaf v. Tuton*, and citing *Buttemere v. Hayes* as laying down the same rule under sec. 17 of 29 Car. II. *Leaf v. Tuton*, 10 M. & W. 393, citing *Eastwood v. Kenyon*, and denying *Maggs v. Ames* and, *semble*, *Barnett v. Glossop*, *Birdsall v. Darling*, 2 U. C. Q. B. 401, followed in *Dempsey v. Winstanley*, 6 U. C. Q. B. 410; *Hotchkiss v. Ladd*, 36 Vt. 593.

(b) *Sykes v. Reeves*, 6 Dowl. P. O. 384; see *Cooth v. Jackson*, 6 Ves. Jr. 16.

(c) *Wildbahn v. Robidoux*, 11 Mo. 660.

(d) *McCulloch v. Tapp*, 4 West. L. Monthly, 575.

demurrer.(e) And the English rule holding a special plea of the Statute of Frauds bad on special demurrer has been followed in the United States.(f)

As has been seen, the plaintiff by pleading over waives the defective special plea of the Statute of Frauds.(g) *Seem*, to an action on an attorney's bill, a plea that no signed bill had been delivered by the plaintiff is not good, and does not go to the merits.(h) In a case in the Supreme Court of New York it was said that it is only where the answer admits the contract alleged in the complaint, that the defendant must plead the Statute of Frauds.(i)

§ 518. The rule that a special plea of the Statute of Frauds is bad has met with denial. In a case in the King's Bench of Upper Canada, it was followed reluctantly and only on authority.(j) In a number of English cases are to be found examples of such special pleas.(k)

Again it has been decided that a defendant can plead the general issue or plead the statute specially, as he pleases.(l) Where the pleadings show that the contract was oral a special plea in bar or motion in arrest of judgment is available as well as a demurrer.(m)

In *Clancy v. Piggott*, Williams, J., said that "The plea in this case is precisely in the same form as that in *Saunders v. Wakefield*, which was held by the court to be a good and sufficient plea, with the addition that the plea on the present occasion sets out what was the actual memorandum in writing which was signed by the defendant. And if the plea would have been good, as *Saunders v. Wakefield* shows, if it had stopped at the allegation of there being no agreement relating to the promise mentioned in the deo-

(e) *Bentham v. Hardy*, 6 Ir. L. Rep. 183, citing *Lilley v. Hewitt*, 11 Price 494; *Johnson v. Dodgson*, 2 M. & W. 653; *Elliott v. Thomas*, 3 id. 176; *Maggs v. Howell*, 4 Bing. 470.

(f) *Myers v. Morse*, 15 Johns. 425; *Thielans v. White*, 11 W. N. Cas. 203 (Phil. C. P. No. 3).

(g) *Hotchkiss v. Ladd*, 36 Vt. 593; *Lysaght v. Walker*, 5 Bligh, N. R. 25. See § 510.

(h) *Beck v. Mordaunt*, 4 Dowl. 112.

(i) *Alger v. Johnson*, 6 Th. & C. 632; 4 Hun, 412.

(j) *Dempsey v. Winstanley*, 6 U. C. Q. B. 410; saying that there was English authority on both sides.

(k) *Read v. Nash*, 1 Wils. 305; *Saunders v. Wakefield*, 4 B. & Ald. 595. But see *Lilley v. Hewitt*, 11 Price, 500, where it was said that the pleadings in *Saunders v. Wakefield* were not called to the attention of the court; see *Myers v. Morse*, 15 Johns. 425.

(l) *Ruggles v. Gatton*, 50 Ill. 414; citing *Read v. Nash*, 1 Wils. 305.

(m) *Fall v. Hazelrigg*, 45 Ind. 576; see *Donaldson v. Newman*, 9 Mo. App. 242.

laration, in which the consideration was stated in writing, signed by the defendant, according to the meaning of the statute, I am at a loss to discover how the introduction of the very precise memorandum upon which the plea is founded can vitiate the plea. It appears to me that it most assuredly does not, and that the undertaking is clearly within the meaning of the Statute of Frauds. I think that *Saunders v. Wakefield* goes the length of disposing of the question.”(n)

A defence that an assignment of a copyright was not in writing was held to require a special plea under the Hilary Term Rules.(o) The last struggle which took place on this rule was when Lord Cranworth, in *Jordan v. Money*, gave an opinion declaring the special plea necessary, which he afterwards in the House of Lords withdrew.(p)

§ 519. Now, as was said in *Futcher v. Futcher* by Fry, J.: “The Judicature Acts. The 23d Rule of Order XIX.,

provides: ‘When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise.’ That rule, in my judgment, allows an allegation of contract simply, and throws on the defendant the burden of alleging the Statute of Frauds, because the rule goes on to provide the manner in which he shall allege it. The result of the rule, in my judgment, is twofold. In the first place, it abolished the old rule of chancery that a writing must be alleged by the plaintiff. Secondly, it abolished the old rule of common law that the point might be raised at the trial for the first time. The rule leaves the plaintiff open to allege a contract without reference to written evidence, and requires the defendant, if he desires to avail himself at the trial of the statute, to raise by his pleadings that issue.”(q)

It is not enough under the Judicature Act for the defendant to say that he intends to rely on the Statute of Frauds. He must show the facts which make the statute applicable, especially where

(n) *Clancy v. Piggott*, 4 N. & M. 502; (p) 5 H. L. C. 216.

2 Ad. & Ell. 473.

(q) *Futcher v. Futcher*, 50 L. J. Ch.

(o) *Barnett v. Glossop*, 1 Bingh. N. 737; see *Clarke v. Callowe*, 46 L. J. Q. C. 633; Hil. T. 4 Will. IV. Ass. I. 3. B. 54.

See 5 B. & Ad. App.; 3 L. N.T.S. (K. B.)

the claim being both for goods sold and work and labor, it was doubtful whether the 17th or 4th section was relied on.^(r)

Where the plaintiff, by alleging the acceptance and receipt of the chattels in suit, seemed to admit that the contract was an oral one, and the defendant denied the contract and the delivery and acceptance, the Court of Queen's Bench said that it was quite consistent with these pleadings that "there was a binding contract within the Statute of Frauds. But even if the plaintiff had avowed that the contract was in writing, or that there had been acceptance and receipt, and the defendant had taken issue so that there could be no doubt as to the meaning of the plea, yet if he traversed the averments without stating the statute on which he relied, the defence under the statute was not admissible; for he must set forth his intention to use that defence in clear terms." And under the rules of the Judicature Act there was no issue raised as to the Statute of Frauds.^(s)

Where a demurrer setting up the Statute of Frauds has been overruled, and the plaintiff amends, the defendant need not have reiterated the statute in his answer to have the benefit of it, even on appeal. The reason why the objection of the statute must be taken before hearing, or in the answer if not previously, is that the plaintiff may have an opportunity to set up part performance; but this does not apply when the statute has once been set up.^(t)

§ 520. The necessity of a special plea of the Statute of Frauds has been insisted upon in some American cases.^(u) In Massachusetts by statute it is required that the defence of the Statute of Frauds should be set up in clear and precise terms.^(v) But where the plaintiff alleged that the defendant made "a certain agreement in writing," and proved

Necessity of special plea urged in some cases.

^(r) Pullen v. Snelus, 48 L. J. Q. B. Dec. 335 (*semble*), Boston Duck Co. v. 396; 40 L. T. Rep. N. S. Q. B. 363, distinguishing Clarke v. Callowe as a case where defendant had erred in traversing the allegations and not expressly relying on the Statute of Frauds. The error there was the converse of the present one. Bottoms v. Goyl Mill Co. (not reported), relied on. ^(s) Clarke v. Callowe, 46 L. J. Q. B. 54.

^(t) Johnasson v. Bonhote, 2 Ch. D. 300; 24 W. R. 619.

^(u) Harrison v. Harrison, 1 Md. Ch.

Dewey, 6 Gray, 446 (*semble*); Laurence v. Chase, 54 Me. 196 (citing form from 3 Chitt. Pl. 909); Lewin v. Stewart, 17 How. Pr. 6; 10 id. 509 (*semble*), citing cases; Rabsuhl v. Lack, 35 Mo. 316 (according to the syllabus); Donaldson v. Newman, 9 Mo. App. 242 (the pleadings showing the contract to be oral); Sorrell v. Sorrell, 4 Ark. 301.

^(v) Middlesex Co. v. Osgood, 4 Gray, 448; Stat. Mass. 1852, c. 312, § 12, 14, 18; see Libby v. Downey, 5 Allen, 299.

a writing not signed, there is a fatal variance, though the plea containing only a general denial was ill.(w)

It is enough in New York to set out the facts which show the Statute of Frauds to apply, without expressly referring to the statute itself.(x) And under the New York Code an answer is sufficient which admits the making of a contract and sets out its terms, though it does not set up the Statute of Frauds as a bar, if the contract as set out in the answer differ from that in suit, because under the Code the defendant only sets out the facts he proposes to prove, and need not draw conclusions of law; before the Code the contract as admitted by the defendant might have been enforced.(y) And since the Code of 1852, Pt. c. 4, §§ 156, 143, 149, the defendant must set up these facts, and he cannot merely plead the Statute of Frauds; if the statement of the plaintiff does not show a good cause of action, the defendant can demur, or he can deny the plaintiff's allegations.(z) So, under the Code of Ohio, an answer must show the facts from which it appears that the contract sued on is within the Statute of Frauds, or that objection will be deemed waived.(a)

An obscurely reported case in 2 Colorado has been explained to the author by a lawyer of distinction in that State, on reasons resembling these. In *Hall v. King*, the decision in question,(b) to a claim for interest due, a plea set forth that the supposed promise was an agreement to pay interest at a greater rate than ten per cent., and that there was never any note or memorandum thereof, &c.; and it was held, on demurrer, to show no defence. The author's correspondent, speaking of this case, says: "The only way to plead such a statute as the above (i. e. one requiring a written promise to pay more than ten per cent. interest), * * would be to allege that there was no stipulation in writing to pay more than ten per cent. interest, and that the interest at ten per cent. would only amount to so much" (a lesser sum).

In Kentucky it is necessary to set up the Statute of Frauds, unless the complaint shows that the contract is oral.(c) So, in

(w) *Reid v. Stevens*, 120 Mass. 209, distinguishing *Middlesex Co. v. Osgood*.

(x) *Goelet v. Cowdrey*, 1 Duer, 140; see *Morrill v. Cooper*, 65 Barb. 512. See § 538.

(y) *Haight v. Child*, 34 Barb. 186. See § 537.

(z) *Will. Eq. Jur.* 282.

(a) *Robinson v. Hathaway*, 4 West. L. M. 105.

(b) 2 Col. 712.

(c) *Smith v. Fah*, 15 B. Mon. 443.

Georgia.(d) In Illinois the law is clearly settled; and the Statute of Frauds must be specially raised by plea, answer, or demurrer.(e)

Where a bill alleges a parol sale of land and sets out facts of part performance, and the answer denies the agreement but does not set up the Statute of Frauds, the answer having been proved to be false as to the existence of a parol contract, the statute not having been pleaded cannot be availed of.(f) In another case it was held that the Statute of Frauds must be set up in some way, or it will be taken to be waived; this was a case of trust, and, *semble*, the answer denied the trust.(g) Nor can it be urged for the first time in a prayer for an instruction; it should, *semble*, have been pleaded.(h)

§ 521. It is not necessary to plead the Statute of Frauds in equity; a denial of the contract in the answer is sufficient.(i) A denial of the contract is stronger in equity, indeed, than at law, being conclusive unless overcome by two witnesses, or one witness corroborated by circumstances.(j) To a prayer for general relief the Statute of Frauds does not have to be pleaded.(k)

Where the defendant's answer in equity denied the trust in suit, in the Chancery of Upper Canada, the judge who gave the opinion said that "as the result of these authorities I am therefore prepared to decide that the Statute of Frauds is open to the defendant as a defence in the present case, though he has not pleaded it, upon the principle that the plaintiff, being put to prove the special

(d) McDougald v. Banks, 13 Ga. 452; see Law v. Henry, 39 Ind. 416. See § 508.

(e) School Trustees v. Wright, 12 Ill. 441; Chicago Co. v. Liddell, 69 Ill. 640 (*semble*, that a plea of *non assumpsit* is not sufficient for the purpose); see also Kinsie v. Penrose, 2 Scamm. 520.

(f) Hull v. Peer, 27 Ill. 317; see Ludeke v. Sutherland, 87 Ill. 482.

(g) Carpenter v. Davis, 72 Ill. 17.

(h) Warren v. Dickson, 27 Ill. 118.

(i) Ridgway v. Wharton, 6 H. L. C. 255; 46 L. J. Ch. 46; Lear v. Chouteau, 23 Ill. 39; Coquillard v. Suydam, 8 Blackf. 30; Mahana v. Blunt, 20 Iowa, 142; Kay v. Curd, 6 B. Mon. 103; Wolf v. Corby, 30 Md. 360;

Artz v. Grove, 21 Md. 456; Small v. Owings, 1 Md. Ch. Dec. 363; McGowen v. West, 7 Mo. 569; Wildbahn v. Robidoux, 11 Mo. 660; Huffman v. Ackley, 34 Mo. 277; Newton v. Swazey, 8 N. H. 13; Johns v. Norris, 22 N. J. Eq. 109; Barnes v. Teague, 1 Jones, Eq. 279; Dunn v. Moore, 3 Ired. Eq. 364; Allen v. Chambers, 4 Ired. Eq. 125; Capehart v. Hale, 6 W. Va. 550; Cleaver v. North of Scotland &c. Co., 27 Grant, 513. See above.

(j) Cooth v. Jackson, 6 Ves. Jr. 16; see Newton v. Preston, Prec. Ch. 103. See Taylor v. Salmon, 4 M. & Cr. 142, to the effect that the Statute of Frauds can be set up in the answer.

(k) Force v. Dutcher, 3 C. E. Green, 405.

trust which he alleges, is bound to prove it by evidence sufficient to the requirements of the statute."^(l)

When a bill sets forth a contract in writing, alleged to be signed by the defendant or his authorized agent, a plea of the statute averring that there is no writing subscribed by the party or his authorized agent is inadmissible, because it is merely denying what is alleged in the bill, and brings forward no new fact in opposition, which is the proper office of a plea. If a denial merely be intended, it must be by way of answer.^(m)

§ 522. There has been greater doubt and inconsistency of decision in regard to the manner of pleading in the Statute of Frauds in equity than even at law. In a case in ^{The last proposition doubted.} Cranch's Circuit Court Reports, it was held that either a plea or answer was available.⁽ⁿ⁾ *Semble*, the application of a particular section of the Statute of Frauds can be specially pleaded; but such a plea will not raise the objection that another section of the statute applies.^(o)

In an Iowa case it was thought doubtful (*semble*) whether the Statute of Frauds should be specially pleaded in equity.^(p) After

(l) *Wilde v. Wilde*, 20 Grant, 531-2; "in *Ridgway v. Wharton* (3 DeG. McN. & G. 689) Lord Cranworth lays down the rule that if a party in a suit in equity is put to proof of an agreement to which the Statute of Frauds applies, he must establish his case by sufficient evidence within the statute. This case of *Ridgway v. Wharton* went to the House of Lords and was there the subject of much discussion, but the rule of pleading it laid down seems to have received the silent acquiescence of the Lords who heard it, for no objection is raised to that part of Lord Cranworth's decision in the Court of Chancery. In *Heys v. Astley* (12 W. R. 64), Sir George Turner, L. J., approves of what Lord Cranworth decided in *Ridgway v. Wharton* on the point of pleading, and in *Butler v. Church* (18 Gr. 190), in our Court of Appeals, the Chief Justice and the learned judges who concurred with him were of the

same opinion. The analogy of pleading at law is also in favor of the defendant, since it was there determined soon after the pleading rules of 1834 were established that a party who put his adversary to proof of a contract which happened to be within the Statute of Frauds did not forego the right to insist on the statute because he did not plead it specially. *Buttemere v. Hayes*, 5 W. & M. 460; *Leaf v. Tuton*, 10 M. & W. 397. The case of *Davies v. Otty* (33 Beav. 540), is also, I conceive, a strong authority for the defendant."

(m) *Bailey v. Leroy*, 2 Edw. Ch. 515.

(n) *Thompson v. Jamesson*, 1 Cr. C. 297; and see *Tarleton v. Vietes*, 1 Gilm. 473; *Esmay v. Gorton*, 18 Ill. 483, citing cases; *Allen v. Chambers*, 4 Ired. Eq. 125.

(o) *Christie v. Clarke*, 16 U. C. C. P. 551.

(p) *Saum v. Stingley*, 3 Coles (Ia.), 516; see *Cook v. Bee*, 2 Tenn. Ch. 345.

answer denying the existence of a certain partnership except upon a certain contingency which did not happen, there was oral proof tending to show such a partnership unqualified by any condition ; an application to plead the Statute of Frauds *ex cautela* was rejected ; the two defences denying the contract and acknowledging it, and setting up the Statute of Frauds, are incongruous and must be pleaded at the outset. Whether such a plea was necessary the court did not decide.(g)

In a case in England before the Lords Justices it was held that the Statute of Frauds as a defence against a bill for specific performances must be expressly pleaded ; it is not enough to deny the contract by answer.(r) It has also been held that in equity, while the Statute of Frauds need not be set up in terms, it must in substance.(s) Daniel says that under modern English practice the defendant, though he has not answered, may set up the Statute of Frauds at the hearing.(t)

In a case in which the defendant urged that it was not necessary for him to set up the Statute of Frauds, inasmuch as the plaintiff, by relying upon the acceptance and receipt of the goods in suit, had admitted the contract to be within the statute, it was held that the Judicature Act, which intended to make the equity rule of specially pleading the Statute of Frauds a general one both of law and equity, applied to the case.(u)

§ 523. There is a rule of pleading, however, which is almost free from doubt ; and that is where a mere plea of the Statute of Frauds is insufficient where the bill alleges part performance and calls for discovery.(v) A plea of the Statute of Frauds or of the Statute of Limitations must be supported by an answer as to the special circumstances charged as taking the cases out of the statutes.(w)

Rule where the bill has alleged part performance.

(g) Cook v. Bee, 2 Tenn. Ch. 345, citing Cozine v. Graham ; Poag v. Sandifer, 5 Rich. Eq. 180.

(r) Heys v. Astley, 3 N. R. 19 ; 12 W. R. 64 ; 9 L. T. N. S. 356. See also Burnand v. Nerot, 1 C. & P. 580 ; see also Harrison v. Harrison, 1 Md. Ch. Dec. 335.

(s) Beatson v. Nicholson, 6 Jur. 620.

(t) Dan. Ch. Pl. 712, citing Lincoln

v. Wright, 4 DeG. & J. (Perkins' ed.) p. 20 ; Jackson v. Oglander, 2 H. & M. 472.

(u) Clarke v. Callowe, 46 L. J. Q. B. 54.

(v) See § 528 ; as to how far a demurrer will lie if insufficient part performance is alleged, see Barb. Ch. Pr. p. 351, 377.

(w) Seton's Forms, I. p. 158, citing Evans v. Harris, 2 V. & B. 364 ; Parkinson v. Chambers, 1 K. & J. 72 ; 3 W. R. 130.

Thus, where one of two joint lessees sold for four guineas his interest to the other, who handed over a pair of compasses to bind the bargain; the court ordered the defendant to answer, saving the benefit of the plea to the hearing.(x) In an early Vermont case, in which the defendant in equity was allowed to plead the Statute of Frauds specially, the court said that an answer is not necessary unless the bill shows part performance,(y) and where part performance is alleged and discovery is asked, the plaintiff is entitled to have an answer from the defendant.(z)

§ 524. The plea has in a number of cases been allowed to stand for an answer, and the benefit of it at the hearing reserved to the defendant.(a) It has been considered that an answer in equity can be amended by adding a plea of the Statute of Frauds.(b) But if a plea of the statute has been overruled the defendant cannot set up the same point in his answer; as to supporting a plea of the Statute of Frauds(c) by an answer, see *infra*.

Plea to stand for an answer, and how far plea of the statute a bar to discovery.

A plea of the Statute of Frauds is a bar to discovery as to all such matters which if discovered and admitted might be barred by the statute, and to this the latter may be pleaded in bar of such discovery.(d)

In the Chancery of Upper Canada it was held that where a bill showed contract for sale of land to be in parol, and relied on part performance, an answer pleading the Statute of Frauds is sufficient; it need not state that the contract was not in writing. The defendant admitted that the plaintiff had executed a title-bond and that the defendant had made payments,*but denied the allegation of the bill that the defendant had taken possession,(e) and it has been unqualifiedly said that when the Statute of Frauds is set up by an answer, the defendant need not either confess or

(x) *Alsopp v. Patten*, 1 Vern. 472.

answer. *Whitbread v. Brockhurst*, 1

(y) *Meach v. Perry*, 1 Chip. (Vt.)

Bro. C. C. 404.

185.

(z) *Evans v. Harris*, 2 V. & B. 364.

(b) *Jackson v. Cutright*, 5 Munf. 311.

(c) *Keatts v. Rector*, 1 Ark. 411.

(a) *Wills v. Stradling*, 3 Ves. Jr. 381;

(d) *Montacute v. Maxwell*, 1 P. Wms.

Cooth v. Jackson, 6 id. 12; *Lowther v.*

618.

Carill, 1 Vern. 221, the court saying

(e) *Townsley v. Charles*, 2 Grant (U.

that at the plea the adequacy of the

C.), 315; see *Butler v. Church*, 18 id.

part performance would not be de-

192; 16 id. 205.

cided, and ordering the defendant to

deny the agreement or its part performance.(f) But in the matter of part performance the authority of early chancery cases in England is the other way. Thus in a case in Cox it was said that "This court has said there may be circumstances under which it will, notwithstanding, execute a parol agreement, and with that view makes a defendant answer the fact of such an agreement being made, in order to give the plaintiff an opportunity of applying such equitable circumstances as he can make out to this agreement.(g)

Lord Eldon said that a plea of the Statute of Frauds is a bar to discovery of an oral contract, but that the rule does not extend to facts subsequent, such as part performance.(h) While a plea of the Statute of Frauds as a bar to discovery is good, there must be a denial of any agreement; and if the pleadings show that there was an agreement and that there was part performance, a bare plea of the statute is certainly insufficient.(i) To a bill alleging part performance a plea of the Statute of Frauds is not properly supported by an answer which does not deny the agreement, and which does not adequately meet the point of part performance.(j)

§ 525. Where the complainant's case showed an oral contract and part performance thereof, a plea of the Statute of Frauds and a traverse of the acts of part performance is ill because double; the object of a plea is to bring up a single point; and the plea was ordered to stand for an answer.(k) A plea denying the contract and one denying the part performance must be separate as the two defences are different, says the annotator of Palmer v. White.(l) Where a bill for specific performance stated an oral contract under the Statute of Frauds and

The rule as to plea not being a bar to discovery when there has been part performance or fraud, and where a writing has been alleged.

(f) *Givens v. Calder*, 2 Dessaus. Ch. 190; see also *Spear v. Hart*, 3 Roberts. 424; *Argenbright v. Campbell*, 3 H. & Mun. 161.

(g) *Walters v. Morgan*, 2 Cox, Ch. 370.

(h) *Taylor v. Beech*, 1 Ves. Sr. 297; see *Moore v. Edwards*, 4 Ves. 23.

(i) *Child v. Comber*, cited in note to 3 Swanst. 426.

(j) *Bowers v. Cator*, 4 Ves. Jr. 96.

(k) *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; see *Rowe v. Teed*, 15 Ves. 372, in which Lord Eldon says that the object of a plea is by the statement of a single fact or of several facts tending to one point, to displace the plaintiff's equity: a demurrer denies the equity taking the plaintiff's averment to be true; and an answer denies the equity by giving all the facts of the case.

(l) Wall. Rep. by Lyne, 22.

alleged part performance, the answer may set up the statute generally, and need not allege that there was no writing.(m)

Under the New York Code, if the plaintiff avers part performance the defendant can either deny the performance or the contract, and upon proving the part performance by oral evidence prove the contract in the same way.(n) Where a complaint shows that the contract was not in writing, and relies upon part performance, an answer that the contract was not in writing is unnecessary and improper.(o) And in a Maryland decision it was said that the defendant must answer all the material allegations of the bill, whether he pleads the Statute of Frauds or not.(p)

The difficulty in the earlier English chancery cases seems to have been an apprehension that if the defendant admitted the oral agreement he could not avail himself of the Statute of Frauds; and though even before *Cooth v. Jackson* the right of the defendant to do so had been admitted, yet Lord Eldon afterwards said that he could not say before *Cooth v. Jackson* what ought to be done when the defendant, having neither admitted nor denied the agreement, denied the sufficiency of the part performance relied on by the plaintiff, and when the latter failed to show such part performance to be adequate. Since *Cooth v. Jackson* there may be an answer to the whole of the plaintiff's case, and in that answer the Statute of Frauds may be set up.(q) Where a bill alleges fraud the defendant must answer the plaintiff's allegation of facts; and a plea of the Statute of Frauds is insufficient.(r)

Following the same general principle, a plea of the Statute of Frauds is insufficient when the pleadings show that the contract was in writing; there must be an answer even (*semble*) where the plea is allowed to stand for an answer.(s) Beames, in his work on Pleading, says that a plea of the Statute of Frauds in bar to dis-

(m) *Townaley v. Charles*, 2 Grant, Ch. 313.

(n) Will. Eq. Ju. 282.

(o) *Law v. Henry*, 39 Ind. 416. So where the contract is admitted; *Mitf. Pl. (Tyl. ed.)* 353.

(p) *Ogden v. Ogden*, 1 Bland, 287.

(q) *Rowe v. Teed*, 15 Ves. 372, considering *Cooth v. Jackson*, 6 Ves. Jr. 16.

(r) *Bailey v. Wright*, 2 Bond, C. C. 181, citing 32d Rule of the United

States Supreme Court. See *Boson v. Statham*, 1 Eden, 513; *Hutchinson v. Tindall*, 2 Green, Ch. 358.

(s) *Cooke v. Toombs*, 2 Anstr. 424. See *Skinner v. McDouall*, 2 DeG. & Sm. 264; 17 L. J. N. S. Ch. 347; 12 Jur. 741; *Roberts v. Francis*, 2 Heisk. 133; *Barnes v. Teague*, 1 Jones, Eq. 279, citing *Morison v. Turnour*, *Whitchurch v. Bevis*.

covery cannot be coupled with an answer admitting the contract.(t) Lord Eldon doubted whether a plea of the Statute of Frauds was not equivalent to an answer denying a writing where the bill had averred a writing; but a plea of the statute and an answer ambiguously denying the writing relied on are insufficient, even when taken together.(u)

§ 526. In a case in Dickens it was thought that while the Statute of Frauds might be specially pleaded there should also be an answer denying the contract.(v) And in the same volume there is a decision that to a bill alleging an agreement that the contract should be put into writing in compliance with the Statute of Frauds, the defendant must answer; his demurrer and plea being saved for the hearing.(w) So a plea of the statute to a bill for specific performance should aver the contract not to have been in writing.(x)

Where the bill avers a writing the answer or plea must deny this.(y) Under the Revised Statutes of New York, the defendant, in an action for specific performance, need only set out his facts, and need not refer to the Statute of Frauds.(z)

Lord Redesdale, in his work on Equity Pleading, writing just after the decision in *Whitbread v. Brockhurst*, stated the law to be that the Statute of Frauds could not be pleaded in bar of discovery, but he seems to have thought the subject to be involved in some obscurity, and the cases not easily to be reconciled. The present writer, having reached a different conclusion, has found the later English writers have almost unanimously expressed themselves as of the opinion that Mitford wrote under the influence of the contradiction and doubt then prevailing in the chancery adjudications, most of which difficulty has been removed by decisions made since the time when that eminent author's work was published.

(t) Beam. Pl. (Halst. ed.) 185.

(u) Morison v. Turnour, 18 Ves. 175.

(v) Child v. Godolphin, 1 Dick. Ch. 39.

(w) Leake v. Morris, Id. 14.

(x) Mussell v. Cooke, Prec. Ch. 533; Bean v. Valle, 2 Mo. 126. See note to Palmer v. White, Wall. Rep. by Lyne, 18, citing several cases; Mitf. Pl. (Tyler

ed.) 353; Welf. Pl. (L. of L. & Eq. vol. 6, p. 326 and p. 135); Coop. Pl. 155; Story, Eq. Pl. § 761; Dan. Ch. Pl. 656; Beam. Pl. (Halst. ed.) 176.

(y) Welf. Pl. *supra*; Dan. Ch. Pl. 656, Story, § 762; Coop. Pl. 256; notes to Palmer v. White, Wall. Rep. by Lyne.

(z) Morrill v. Cooper, 65 Barb. 512; see Golet v. Cowdrey, 1 Duer, 140.

There can be little question but the problem, then unsettled, of reconciling an admission by the defendant of the oral contract with the benefit to him of the provisions of the Statute of Frauds is what is at the root of all the contradiction which once prevailed on this subject. On the one hand it was argued that when the defendant had admitted the contract under oath, it was absurd to pretend that there was any danger of enforcing against him a promise proved by fraud or perjury. On the other, it was argued that it has never been pretended that the Statute of Frauds did not apply in chancery, and that if it did, to compel the defendant to discover the contract by his answer was either to induce him to make a perjured denial, if there had really been an oral promise, or to deprive him of the defence of the statute.

It now being settled law that a defendant can have the benefit of the Statute of Frauds whether he admits the contract or not, there is no reason why he should not be allowed by a plea of the statute to refuse discovery.^(a) Under the New York Code (1852),

(a) See Fonbl. Eq. (p. 180) n. d., an able note by Fonblanque; see Beames Pl. (Halst. ed.) 176, which says that *Whitbread v. Brockhurst*, upon which Mitford principally relied, is of doubtful weight as an authority. The plaintiff there averred a writing and part performance, and the defendant denied both, and the point decided was that this plea was bad because double, and that it was the double allegation in the bill that gave rise to the difficulty which arose upon the pleadings. Beames considers that the Statute of Frauds is not a bar to discovery except in the case of a trust. Story, on the contrary (Eq. Pl. § 763), thinks that the statute is a bar to discovery except in the case of a trust; see *infra*; Welford (Eq. Pl. L. of L. & Eq. vol. 6, p. 326 and p. 135), that the Statute of Frauds is perhaps not a bar to discovery, and that it certainly is not where there is part performance or fraud, or a violation of public policy. Welford agrees with Beames in thinking that the Statute of Frauds is a bar to discovery in the case of a trust. Story (Eq. Pl.

§ 762, n. 4 *et seq.*), citing Coop. Eq. Pl. 256, thinks that the statute is a bar to discovery, but that in the case of a trust it is not so, but he evidently has in mind the attempt of the defendant to plead the Statute of Frauds in bar to a discovery of a trust, which, if stated, would be found to be in violation of public policy, as, for example, a secret trust for the benefit of a charity, a devisee.

The following authorities admit that the plea of the Statute of Frauds is a bar to discovery: Wood Lect. (L. L. vol. 39) III. p. *226-7, citing *Whaley v. Bagnel*, 1 Bro. P. C. 345; *Whitchurch v. Bevis*, the notes to *Palmer v. White*, Wall. Rep. by Lyne, 18; Dan. Ch. Pl. & Pr. 655, &c.

In Hare on Disc. it is stated that the Statute of Frauds may be pleaded in bar of discovery when the bill shows the statute to apply; citing *Spurrier v. Fitzgerald*, 6 Ves. 548; *Morrison v. Turnour*, 18 id. 175; *Evans v. Harris*, 2 V. & B. 364. Willis (Eq. Pl. p. 563 n.) supports Mitford, and seems to suppose that as the benefit of the statute is had by way

Pt. III. c. 4, §§ 156, 143, 149, if the defendant does not demur he must answer whether the agreement in the bill is true or not.(b) As has been already stated, Lord Redesdale's view is well sustained when we apply it to those cases in which the plaintiff in his bill shows the case to be taken out of the Statute of Frauds, as where he has partly performed, or where the defendant has been guilty of fraud or is attempting to conceal a violation of some rule of public policy, such as the Mortmain Act; here the plaintiff is entitled to his discovery.(c)

§ 527. The following are examples of denials of the contract in suit which more or less explicitly set up the defence of the Statute of Frauds. Thus a plea saying that the defendant had not entered into a contract of the kind stated by the plaintiff, or into any valid contract, is sufficient.(d) But a plea by the defendant that he is not bound to perform is insufficient.(e) An answer that the plaintiffs had not fulfilled their part, and therefore the defendant is not bound, is insufficient under the Massachusetts statute.(f) An objection that the plaintiff had not the power to give a lease, not owning the land,

of an answer, there is no use in pleading it in bar even of relief, citing Mitf. Pl. 217; Beames, Pl.; Rowe v. Teed, 15 Ves. 375.

(b) Will. Eq. Jur. 232.

(c) See notes to *Palmer v. White*, Wall. Rep. by Lyne, 18, where the conclusion drawn by the annotator as to Mitford's statement is that where part performance is averred, and facts amounting to part performance are also averred in the bill, a plea is useless and must be coupled with an answer as to the part performance; and where an oral contract is stated part performance must be averred or the bill is demurrable. Bouvier, in his Institutes, p. 451, says that where the bill shows a case taken out of the Statute of Frauds, the defendant must answer as to the details of the contract, and he cannot make a pure plea of the statute; see also Beames, Pl. (Halst. ed.) p. 176; Welf. Pl. (L. of L. & Eq. vol. 6, p. 326 and 135; Fonbl.

Eq. Pl., 3d Am. ed.), note by E. D. Ingraham, p. 183 n. (c), to the effect that where part performance is averred the defendant must give discovery, and cannot fall back upon the Statute of Frauds. He may either deny the agreement or the part performance, or the connection between the two, but, *semble*, he cannot make a plea of the Statute of Frauds in bar to the discovery. There must, said Story (Eq. Pl. § 764), be averments by the defendant denying the plaintiff's allegations, and there can be no pure plea of the Statute of Frauds. See Dan. Ch. Pl. & Pr. 656, to the same effect, and adding that the defendant who does not make these denials will be held to have admitted the allegations of the plaintiff.

(d) *Mahana v. Blunt*, 20 Ia. 142.

(e) *Vaupell v. Woodward*, 2 Sandf. Ch. 143.

(f) *Middlesex Co. v. Osgood*, 4 Gray, 448; Mass. Stat. 1852, c. 312, §§ 12, 14, 18.

does not raise the objection of the 4th section of the Statute of Frauds.(g)

A general denial of any liability is sufficient, though an oral contract was admitted, the only memorandum put in evidence being insufficient.(h) It has been doubted whether an answer submitting it to the court whether the contract alleged in the bill was in law or equity such as ought to be enforced against the defendant, was a sufficient plea of the Statute of Frauds.(i) And so whether a plea that the contract was void was without more sufficient.(j) *Query*, whether a denial of the sufficiency of the part performance alleged by the plaintiff, and the suggestion "unless the acts after-mentioned can be so construed," followed by an admission of the acts set out in the bill, is an adequate presentation of the defence of the Statute of Frauds.(k)

The following was held an insufficient denial, viz., "denies every allegation and every inducement leading to that issue whereby the respondent is charged with the purchase of the property," and was regarded as a statement of a conclusion of law and inconsistent with admission of the fact of the contract clearly stated in the bill.(l) A plea of the Statute of Frauds which mistakenly referred to the certain Revised Statutes is not ill.(m) A plea of the statute so phrased as to apply rather to an agent's authority may be interpreted to apply to the contract itself, the agent's verbal authority being good.(n)

Where the plaintiff having declared on a written contract, the defendant's plea setting out another writing *absque hoc* that the contract was contained solely in the writing averred by the plaintiff is good, and its purpose in bringing a point of law before the court legitimate.(o) An answer denying any such agreement as alleged, and indeed any binding agreement, is not a sufficient pleading of the Statute of Frauds.(p) A notice in a statement of defence that the defendant will, if necessary, avail himself of the Statute of Frauds, will

(g) *Christie v. Clarke*, 16 U. C. C. P. 551. ing *Talbot v. Bowen*, 1 A. K. Marsh. 436.

(h) *Reeves v. Pye*, 1 Cranch, C. C. 220.

(m) *Tufts v. Tufts*, 3 W. & Min. 476.

(i) *Barry v. Coombe*, 1 Pet. (U. S. S.

(n) *Small v. Owings*, 1 Md. Ch. Dec.

C.) 648.

(o) *Whitmore v. Johnson*, 1 Jebb &

(j) *Rhodes v. Rhodes*, 3 Sandf. Ch. 283.

Syme, 15; see *Morrill v. Cooper*, 65

(k) *Whitbread v. Brockhurst*, 1 Bro.

Barb. 516.

C. C. 404.

(p) *Skinner v. McDouall*, 17 L. J. Ch.

(l) *Fleming v. Holt*, 12 W. Va. 160, cit-

347; 2 DeG. & S. 265; 12 Jur. 741.

not raise the defence of the statute without stating the facts on which the party relies.(q) An answer is insufficient if from its admission the plaintiff's case can be made out without resort to oral evidence.(r)

§ 528. How far the replication is permitted or required to be special in its averments is not clear from the little authority there is on the subject. It has been held that under the replication *de injuria*, being equivalent to the general issue, the Statute of Frauds is available.(s) It was held formerly that to a plea in a suit on a guaranty that the contract was not in writing, a replication that there was such an agreement in writing should set out the writing, but the omission may be cured by an amendment.(t) But this rule is now denied.(u)

In a case difficult to reconcile with this, there was a declaration setting out a guaranty; to this a plea of the general issue; and to the special counts a plea *actionem non*, because there was no memorandum in writing, &c., stated or shown, &c.; and a replication of *precludi non* because there was an agreement in writing and shown; on a demurrer to the replication because the alleged contract was not set out, judgment was given for the plaintiff; the court saying that this mode was prolix, novel, and doubtful, and that the necessary solemnities of a contract need not be averred.(v) A demurrer to a plea of the Statute of Frauds admits the contract not to have been in writing.(w)

In Illinois where the defendant brings up a new case the plaintiff, if he wishes to set up the Statute of Frauds, must amend his bill, as the special replication is disused, and a general replication will not give the plaintiff the benefit of the statute.(x) To a plea denying a writing signed the replication must aver such.(y) Where

(q) *Bottoms v. Goyle & Co.*, 48 L. J. C. P. 394.

(r) *Dean v. Dean*, 1 Stockt. 428.

(s) *Sweet v. Lee*, 3 M. & G. 453; 4 Scott, N. R. 77; 5 Jur. 1134.

(t) *Lowe v. Eldred*, 1 Cr. & Mees. 239.

(u) *Wakeman v. Sutton*, 2 A. & E. 78, citing *Lilley v. Hewitt* and denying *Lowe v. Eldred*. See for a like ruling under the Statute of Limitations, *Kempe v. Gibbon*, 12 Q. B. 662.

(v) *Lilley v. Hewitt*, 11 Price, 500; saying that the pleadings in *Saunders v. Wakefield* were not called to the attention of the court.

(w) *Maggs v. Ames*, 4 Bingh. 470; 1 M. & P. 294.

(x) *Tarleton v. Vietes*, 1 Gilm. 470.

(y) *Thomas v. Trustees of Harrodsburg*, 3 Marsh. 299.

the plaintiff declared on a contract and the defendant pleaded the general issue and that there was no writing as required by the Statute of Frauds, and the plaintiff replied that there was such a writing, and the defendant joined in this issue: the court made an order on the plaintiff to produce the writing, though the writing was a letter from the defendant's agent. The decision went on the ground that the pleadings showed the existence of a writing, and the defendant, though he denied the existence of a writing sufficient under the Statute of Frauds, was entitled to inspect the writing alleged by the plaintiff to exist.(z)

A replication must aver what the plaintiff would have had to prove under his declaration, and there must be no variance.(a) Where the defendant made a counter-claim, the plaintiff denied the contract and pleaded the Statute of Frauds, it was held that the fact should have been stated in the replication, and, *semble*, the particular part of the statute relied on.(b)

To a plea of the Statute of Frauds that the promise was to answer for the debt of another, viz., W. &c., a replication that it was not a promise to answer for W.'s debt is good without adding for any other person.(c) There is authority in Indiana for holding that the Statute of Frauds may be set up by a motion in arrest of judgment.(d)

§ 529. If the defendant at law or in equity admits the contract and does not set up the Statute of Frauds, the latter is waived,(e) unless the statute is specifically insisted upon The effect of not setting

(s) *Blogg v. Kent*, 6 Bingh. 614.

(a) *Wheelwright v. Moore*, 1 Hall, 652.

(b) *Dinkel v. Gundelfinger*, 35 Mo. 172.

(c) *Hotchkiss v. Ladd*, 36 Vt. 593.

(d) *Fall v. Hazelrigg*, 45 Ind. 576; *Livesey v. Livesey*, 30 Ind. 398; even though a demurrer to the complaint would under the Indiana law have been more proper. See § 539 *et seq.*

(e) *Anon.*, 2 Freem. 128, pl. 154; *Gunter v. Halsey*, Ambler 586; *Lacon v. Mertins*, 3 Atk. 4; *Symondson v. Tweed*, Prec. Ch. 374; *Eyre v. Ivison*, cited in *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Walters v. Morgan*, 2 Cox, Ch. Ca. 369;

Cooth v. Jackson, 6 Ves. Jr. 12; *Beatson v. Nicholson*, 6 Jur. 620; *McNabb v. Nicholl*, 3 U. C. L. J. N. S. 21; *Corbett v. O'Reilly*, 8 U. C. Q. B. 132; *Thompson v. Tod*, 1 Peters, C. C. 388; *Thompson v. Jamieson*, 1 Cranch, C. C. 295; *Union Mutual Ins. Co. v. Commercial Ins. Co.*, 2 Curtis, C. C. 544; *Williams v. Morris*, 95 U. S. S. C. 456-7; *Henley v. Brown*, 1 Stew. (Ala.) 144; *Ritch v. Thornton*, 65 Ala. 309; *Bolling v. Munchus*, Id. 561; *Keatts v. Rector*, 1 Ark. 411; *Wynne v. Garland*, 19 Ark. 34; *Burt v. Wilson*, 28 Cal. 632; *Hollinshead v. McKensie*, 8 Ga. 457; *Talbot v. Bowen*, 1 A. K. Marsh. 486; *Boston v. Nichols*, 47 Ill.

up the Stat- in the pleading.(f) Not pleading the statute waives
ute of it; the contract not being denied, and the pleadings of
Frauds in the plead- the plaintiff not showing the contract to be oral.(g) In
ings. the Scotch law, in certain cases, the party's oath or an
acknowledgment in the pleadings will supply defects in the writ-
ing.(h) Where the complaint alleges a contract and the answer
admits it, the Statute of Frauds must be specially pleaded.(i)

An answer in equity admitting the contract and not setting up the
Statute of Frauds waives the latter, not because the answer is such
a memorandum as is required by the statute, but because the latter
is waived by not being set up.(j) If the agreement is admitted
in the answer, expressly or by necessary inference, the defendant

356; *Adkinson v. Tanner*, 68 Ill. 248; *Chicago Coal Co. v. Liddell*, 69 Ill. 640; *Livesey v. Livesey*, 30 Ind. 39; *Morrison v. Collier*, 79 Ind. 421; *Collins v. Vandever*, 1 Ia. (Clarke) 576; *Bennett v. Tiernay*, 78 Ky. 583; *Lafiton v. Doiron*, 12 La. Ann. 165; *Patterson v. Cunningham*, 3 Fairf. 512; *Elder v. Elder*, 1 Fairf. 80; *Stearns v. Hubbard*, 8 Greenlf. 320; *Spencer v. Pearce*, 10 G. & J. 299; *Lingan v. Henderson*, 1 Bland, 247; *Harrison v. Harrison*, 1 Md. Ch. Dec. 331; *Winn v. Albert*, 2 Md. Ch. Dec. 164; *Climer v. Hovey*, 15 Mich. 18; *Luckett v. Williamson*, 37 Mo. 388; *Newton v. Swazey*, 8 N. H. 13; *Tilton v. Tilton*, 9 N. H. 389; *Dean v. Dean*, 1 Stockt. 425; *Ashmore v. Evans*, 3 Stockt. 151; *Van Duyne v. Vreeland*, 1 Beasly, 142; *Harris v. Knickerbacker*, 5 Wend. 638; *Duffy v. O'Donovan*, 46 N. Y. 226; *Allen v. Chambers*, 4 Ired. Eq. 155; *Barnes v. Teague*, 1 Jones, Eq. 277; *Thomas v. Kyles*, 1 Jones, Eq. 305-6; *Ogden v. Ogden*, 4 Ohio St. 190; *Smith v. Brailsford*, Desaus. 350; *Stoney v. Shultz*, 1 Hill Ch. 499; *Raymond v. Huddleston*, cited in 2 Heisk. 175 n.; *Pool v. Wedemeyer*, 56 Tex. 299; *Argenbright v. Campbell*, 3 Hen. & Mun. 161; *Adams v. Patrick*, 30 Vt. 516; *Montgomery v. Edwards*, 46 Vt. 153; *Whit-*

ting v. Gould, 2 Wis. 593. See chapter on Voluntary Performance.

(f) *Cooth v. Jackson*, 6 Ves. Jr. 16; *Ridgway v. Wharton*, 6 H. L. C. 255; 27 L. J. Ch. N. S. 46; *Guynn v. McCauley*, 32 Ark. 116; *Arguello v. Edinger*, 10 Cal. 158; *Kirksey v. Kirksey*, 30 Ga. 156; *Dyer v. Martin*, 4 Scamm. 148; *Lear v. Chouteau*, 23 Ill. 39; *Rugles v. Gatton*, 50 Ill. 414; *Artz v. Grove*, 21 Md. 456; *McGowen v. West*, 7 Mo. 569; *Huffman v. Ackley*, 34 Mo. 277; *Walker v. Hill*, 6 C. E. Green, 191; *Force v. Dutcher*, 18 N. J. Eq. 402; *Johns v. Norris*, 22 N. J. Eq. 109; *Jervis v. Smith*, 1 Hoff. Ch. 472; *Woods v. Dille*, 11 Ohio, 455; *Patton v. Rucker*, 29 Tex. 407; *Fleming v. Holt*, 12 W. Va. 180. And see cases cited just above.

(g) *Hodgson v. Hutchinson*, 5 Vin. Abr. 522; *Moore v. Edwards*, 4 Ves. 23; *McDougald v. Banks*, 13 Ga. 452; *Noyes v. Evans*, 6 Vt. 629; *Chambers v. Rowe*, 36 Ill. 174; *Jones v. Slubey*, 5 Harr. & Johns. 382.

(h) *Brown v. Campbell*, Bell Fol. Cas. 115.

(i) *Alger v. Johnson*, 6 Th. & Cook, 632; 4 Hun, 412.

(j) *Newton v. Swazey*, 8 N. H. 13; *Winn v. Albert*, 2 Md. Ch. Dec. 164.

desiring to have the protection of the statute must claim it by the answer.(k) Failure to put in an answer is equivalent to a confession that the Statute of Frauds was waived or complied with.(l)

Taking issue and failing to demur may waive the Statute of Frauds.(m) Where the parties do not make a point of the Statute of Frauds, it is error for the court to do so.(n) There is no danger of perjury where the agreement is confessed.(o)

§ 530. Where the contract and part performance of it are confessed, the Statute of Frauds still less applies.(p) But so far as the plaintiff is obliged to rely upon oral evidence, he cannot in absence of part performance, recover, although part of the contract is confessed by the defendant.(q)

The rule as to part performance or tender.

In a New Jersey case the Chancellor said: "In this case the agreement as to its terms, and in every respect, is as satisfactorily established before the court as if it had been in writing; it is set out in all the pleadings by the different parties, without any variation in the slightest particular."(r) Where the defendant under a plea of tender has paid the money into court, he admits the promise sued on and cannot set up the Statute of Frauds.(s)

§ 531. The rule that a voluntary waiver of the Statute of Frauds admits oral evidence prevails also in Louisiana. Thus a verbal sale of slaves can be established if the opposing party does not object,(t) and this though the Code of Louisiana declared such sales null.(u) If either party to an oral agreement as to land acknowledges it or permits oral proof to be given of it, it will be enforced.(v) Though a contract for high interest must

The rule in Louisiana as to admission in the pleadings of the oral contract; general examples.

(k) *Cleaver v. North of Scotland Co.*, 27 Grant, 513, citing *Heys v. Astley*, 12 W. R. 64, and other authorities.

(l) *Newton v. Swazey*, 8 N. H. 13; *Tilton v. Tilton*, 9 N. H. 389; *Lear v. Chouteau*, 23 Ill. 39; *Huffman v. Ackley*, 34 Mo. 277; *McGowen v. West*, 7 Mo. 569; *Artz v. Grove*, 21 Md. 466; *Holman v. Vallejo*, 19 Cal. 500; *Woods v. Dille*, 11 Ohio, 455; *Allen v. Chambers*, 4 Ired. Eq. 125.

(m) *McCullouch v. Tapp*, 4 West. L. Monthly, 575 (Ohio).

(n) *Deutsch v. Bond*, 46 Md. 168.

(o) *Croyston v. Banes*, Prec. Ch. 208; 1 Eq. Ca. Abr. 19, pl. 3; 2 id. 44, pl. 6; *Allen v. Chambers*, 4 Ired. Eq. 125.

(p) *Smith v. Brailsford*, 1 Desaus. 350; *Keith v. Purvis*, 4 id. 120.

(q) *Cole v. White*, cited in *Whitbread v. Brockhurst*, 1 Bro. C. C. *416.

(r) *Sinclair v. Armitage*, 1 Beas. Ch. 177.

(s) *Middleton v. Brewer, Peake*, N. P. C. 15.

(t) *Jacob v. Davis*, 4 La. Ann. 39.

(u) *Wells v. Hunter*, 5 Mart. N. S. 121.

(v) *Brown v. Frantum*, 6 La. 46; so as

be in writing, the writing is not of the essence of the contract, and failure to answer interrogatories will be considered to admit the agreement.^(w)

Where inadmissible parol evidence to affect a writing has been admitted without objection, it cannot afterwards be struck out; the court citing the example of oral evidence admitted without objection to prove sale of land.^(x) Where no objection is made to the title to land, it may be orally proved in a suit before a justice for unlawful detention of the land.^(y) An oral contract relating to land and giving by part performance an equitable title, is lost if not asserted in an ejectment brought against such equitable holder.^(z)

A curious converse case, in which one relying upon the Statute of Frauds cannot afterwards claim that the statute did not apply, was as follows: A sale being made by order of court, the latter, thinking that the Statute of Frauds applied, had ordered a resale, and in a suit then brought for the difference of price on the resale from the former price, it was held that though the adjudication of the court below that the statute applied to judicial sales was incorrect, yet that as the defendant had induced the lower court to decide that he was not bound and to order a resale, he cannot avail himself of the error.^(a)

In a Tennessee case the court said: "We adopt the rule that when there is a legal and illegal mode of exercising a power or executing a trust, and the proof leaves it doubtful which has been used, the legal presumption in favor of innocent purchasers or meritorious claimants is that it has been exercised in the legal mode. Upon this principle we are justified in holding that the contracts for the sales of the lots by Armour were legally made by written agreements or title-bonds, rather than by parol. It is satisfactorily shown that the lots sold by Armour were paid for by the purchasers, and that the present defendants claim through regular conveyances."^(b)

§ 532. The following are some examples of sufficient confession of the contract to satisfy the Statute of Frauds. Thus, where the answer to a bill for specific performance acknowledges the receipt of fines for a lease, and

to a guaranty, *Taylor v. Smith*, 15 La. Ann. 416.

(w) *Cox v. Mitchell*, 7 La. 523.

(x) *Huey v. Drinkgrave*, 19 La. 483.

(y) *Compton v. Ivey*, 59 Ind. 353.

(z) *Zimmerman v. Wengert*, 31 Pa. St. 404.

(a) *Watson v. Violet*, 2 Duv. 333.

(b) *Murdock v. Leath*, 10 Heisk. 188.

readiness at one time to lease, and refers to a written memorandum (a letter to a third person), stating the contract, the Statute of Frauds is satisfied.(c) Where the memorandum of sale of land described the latter no further than by saying "the money to be paid as soon as the deeds can be had from Mr. Deane;" the court held that a reference to Mr. Deane would ascertain the house; and adding that the defendant, by declining an inquiry before a master, had waived the uncertainty, decreed specific performance.(d)

Where a memorandum recited a sale to be on the account of John Riggin, Jr., the defendant having elicited that this interest was that of a share in the proceeds of the sale on certain conditions, cannot complain that a writing is being impeached by parol,(e) and an uncertainty in a memorandum may be removed by the defendant's answer.(f) An allegation in a complaint, not denied, that there was a part delivery and acceptance of goods, satisfies the Statute of Frauds.(g)

(c) *Hartley v. Wilkinson*, Ridg. L. & S. (1 Ir. Term) Rep. 357.

The following is an example of a sufficient confession: the court said: "The bill first states the mortgage made to the defendants, the company; then it alleges the sale by the company under the power of sale, and next states the contents of the advertisement as to the crops, the subject now in question.

"The answer in terms only admits that the company were mortgagees. It then, however, says that when the plaintiff bid for and was declared the purchaser of the lands, &c. Again, that the sum bid by the plaintiff was a low price, &c. The company charge that the plaintiff was not in fact the real purchaser of the lands at said sale, &c. Again, that after the said sale, &c. Again, the company say that they were not bound to put the plaintiff in possession, but they never did any act to prevent her taking possession; and they in fact charge that possession was taken by the plaintiff. Again, the company say that they were always willing the plaintiff should take possession, &c.; and the answer claims no ben-

efit from the Statute of Frauds, and they do not deny having made the contract.

"The only reasonable interpretation of this language is that the sale was made by the company, and the reference to the said sale; that it was the sale mentioned in the bill. They do not deny the plaintiff's right to take possession, and indeed insist that they were always willing she should take possession, and that she had in fact taken possession. The effect of these statements is, in my opinion, an admission that they made the agreement to sell to the plaintiff, but for various reasons are not bound to carry out its terms, none of these reasons being that it was not signed so as to bind them;" *Cleaver v. North of Scotland &c. Co.*, 27 Grant, 513.

(d) *Owen v. Thomas*, 3 M. & K. 353; see *Clarkson v. Noble*, 2 U. C. Q. B. 364.

(e) *Briggs v. Munchon*, 56 Mo. 470.

(f) *Id.*; *Connell v. Mulligan*, 13 Sm. & M. 390.

(g) *Dennison v. Carnahan*, 1 E. D. Sm. 146.

Where a complaint showed a promise by the defendant to make a certain payment as for his own debt, a demurrer, by admitting this fact, shows the promise to be an original one and not a guaranty within the Statute of Frauds.^(h) The want of a writing is obviated by the defendant having stated in an answer in chancery that she had given the guaranty, and in which she, in effect, insisted that the same was valid and binding on her. This answer was to a bill filed by a creditor of one James T. Mills, to reach a fund in her hands; and her defence was hers superior obligation to Young, upon her guaranty, his title to the claim purchased of James T. Mills having failed.⁽ⁱ⁾

In a Scotch case it was held that a declaration made by a defendant in the nature of an answer or plea, though irregularly taken, since he should only be held on written evidence, might under the circumstances be held to be an admission to bind and be treated as if it were a sworn statement.^(j) Where heirs waive the defence of the Statute of Frauds and agreed that land shall be conveyed to the vendee upon his making satisfactory proof of a purchase from the ancestor, the question to be decided is whether the oral proof shows such a purchase.^(k)

§ 533. The following are examples of such admissions as were insufficient to satisfy the Statute of Frauds.

Examples of
insufficient
admissions.

Thus where only a note in writing shown was insufficient and the defendant denied all liability sought to be imposed upon him by the plaintiff, a statement by him of the the existence of a verbal contract will not bind him.^(l)

Where the contract alleged by the plaintiff differs from that alleged by the defendant, oral proof is not admissible on the plaintiff's part, though the defendant has not pleaded the Statute of Frauds.^(m)

Where the defendants deny the agreement set out in the complaint, and set up an agreement to reconvey to the plaintiff upon

(h) *Muller v. Maxwell*, 2 Bosw. 359; (k) *Brown v. Board*, 3 Kent. Law see *Chicester v. Cobb*, 14 L. T. N. S. 433. Reporter (S. C. Ky.), 612.

(i) *Mills v. Mills and Young v. Roberson*, 3 Head, 710. (l) *Reeves v. Pye*, 1 Cranch, C. C. 221; see, for an insufficient admission,

(j) *Porteous v. McBeath*, Hume, 98; Force v. Dutcher, 18 N. J. Eq. 402. see *Brown v. Campbell*, Bell Fol. Cas. 115; see *Stewart v. Russell*, 18 Fac. 441.

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different terms and conditions, and do not, in terms, set up the Statute of Frauds, the contract set up in the answer cannot be held sufficient to take the case out of the statute, as it does not correspond with that alleged in the complaint.(n)

§ 534. The rule that an admission coupled with a failure to set up the Statute of Frauds waives the latter, applies to the case of trusts;(o) and the trust will be declared when the statute is not set up,(p) for by so doing the defendant admits the trust and waives the statute.(q) An answer in equity is sufficient proof of a trust,(r) especially when corroborated by oral evidence.(s)

An answer of an executor that he had used the assets of the estate to buy land with, does away with the Statute of Frauds, and lets in parol proof; but an answer by the executor's administrator admitting certain matters in the executor's account did not do more than furnish a ground for an inquiry into the alleged resulting trust.(t) An answer of an alleged trustee admitting a parol direction of a testator to the alleged trustee, a legatee, whereby it was claimed a trust arose, took the case out of the Statute of Frauds, but as in this case there was no other proof of the trust except the answer, the latter must be taken as a whole, and could not be impeached by other evidence.(u)

§ 535. While, as has been seen, if the defendant's version of the contract differs from the plaintiff's, there is no such admission as will satisfy the Statute of Frauds, yet the plaintiff, by adopting the defendant's version, may treat it as an admission and recover, notwithstanding the Statute of Frauds.(v) Thus, where the defendants pleaded the Statute

Rule where plaintiff's and defendant's versions differ.

(n) *Morrill v. Cooper*, 65 Barb. 516, 124; *McLaurie v. Partlow*, 53 Ill. 345.

citing cases. *Semble*, only the contract as alleged in the bill can be specifically enforced; *Harris v. Knickerbacker*, 5 Wend. 643; see *infra*. (s) *Reid v. Reid*, 12 Rich. Eq. 213.

(o) *Pinney v. Fellows*, 15 Vt. 538. (t) *Ryall v. Ryall*, 1 Atk. 59.

(p) *Flagg v. Mann*, 2 Sumn. 528; (u) *Nab v. Nab*, 10 Mod. 404. As to

Jones v. Nabbs, Gilb. Rep. Eq. 146; the effect of an admission of a result-

see *contra*, *Smith v. Howell*, 3 Stockt. 349, *infra*. ing trust; and as to mode of proving

facts and examining witnesses in this

relation; see *Freeman v. Tatham*, 5

Hare, 329. (v) *Haight v. Child*, 34 Barb. 191; see

Goelet v. Cowdrey, 1 Duer, 140; *Ryno v.*

Darby, 5 C. E. Green, 231.

(r) *Williard v. Williard*, 56 Pa. St.

of Frauds, and set up in their answer a different contract from that alleged in the bill, and the plaintiffs amended and adopted the contract set out in the answer, and the defendants did not answer the amended bill, except one defendant, who did not set up the Statute of Frauds; it was held that the latter was waived.(w)

Where, in the case of differing statements of the contract given by the parties, from the whole evidence in the cause the court is satisfied that a contract is proved clear and certain in its terms, but in some material respects different from that stated in the bill or answer, the court may, in the interest of justice, with the consent of the plaintiff, in the exercise of a sound discretion decree the specific execution of the contract as proved by the evidence, or the strong preponderance of the evidence, and especially so if the court sees and is satisfied, from the whole proceedings in the cause, that injustice will not thereby be done to the defendant by surprise.(x) In a suit for specific performance of a parol contract for the sale of land, to which the defendant did not set up the Statute of Frauds, but set up and proved a different contract from that alleged in the bill, it was held that plaintiff's bill must be dismissed unless he will agree to the contract as set up and proved by the defendant.(y)

Where the court found that the defendant, relying upon the Statute of Frauds, untruthfully denied the agreement, it would give no costs, and left the plaintiff to his election whether he would have his bill dismissed or take a decree of the contract as far as admitted by the defendant.(z) Where a lessee brought a bill for specific performance of a parol lease within the Statute of Frauds, and his proof varied from his bill and the defendant's answers, and the plaintiff had built on the leased land on the faith of the lease; Lord Loughborough decreed performance of the lease as set up in the defendant's answer, and put costs on the plaintiff.(a) The proper mode of pleading where part performance has been relied on in a bill, and the answer sets up another contract and denies that the part performance was under the contract set out in the bill, and the plaintiff wishes to adopt the contract set out in the answer, is to

(w) *Patterson v. Ware*, 10 Ala. 447, citing cases.

(z) *Stretton v. Stretton*, 24 Grant, 20.

(x) *West Va. Land Co. v. Vinal*, 14 W. Va. 686.

(a) *Mortimer v. Orchard*, 2 Ves. Jr. 243; see Sumner's criticism on this case in his edition of Vesey.

(y) *McComas v. Easley*, 21 Gratt. 29.

file an amended bill praying the benefit of the contract set out in the answer, referring generally to the part performance alleged in the original bill, and claiming such part performance to be under the contract as admitted in the answer. Any other course incumbers the record and increases the costs.(b)

Where an answer admits a different contract from that alleged in the bill, no decree will be made ordering the purchase-money paid into court where the plaintiffs do not offer to perform the contract as stated by the defendant.(c) The plaintiff may, by amending, recover on the agreement actually proved, but if he does not do so his bill will be dismissed.(d) In a late West Virginia case the court said that where the contract proved varies from that set up in the bill, and the contract proved is clear and certain in its terms, and is such as a court of equity might properly enforce, and the court below decrees a specific execution of the contract set out in the bill, the decree must be reversed; but the appellate court will not dismiss the bill, but will remand the cause to the court below, to put the plaintiff to his election either to have a specific execution of the contract as proved, or to have the same rescinded and the parties put *in statu quo*.(e)

Where there was a bill for specific performance and for compensation for improvement, the defendant denied the contract, and alleged by his answer another contract which the plaintiff had refused to carry out; it was held that proof to contradict the answer was not admissible, and that as the plaintiff's improvement had not been under the contract admitted by the defendant, no compensation could be allowed.(f) Where the plaintiff abandons his version he may recover on that admitted by the defendant, but unless he does so he cannot.(g)

Where the plaintiff sued for the specific performance of a written lease and the defendant filed a cross-bill for specific performance of a parol agreement of lease, insisting that the written

(b) *Willis v. Evans*, 2 Ball & B. 228.

(c) *Benson v. Glastonbury*, 1 Coop. C. C. (Eng.) 42.

(d) *Daly v. Coghlan*, 3 Ir. Jur. N. S. 151; see *Baker v. Hollobaugh*, 15 Ark. 327, as to necessity of an amendment.

(e) *Baldenberg v. Warden*, 14 W. Va. 408.

(f) *Sain v. Dulin*, 6 Jones, Eq. 197, distinguishing *Love v. Neilson*, 1 id. 339, as a case where there was no answer but only a plea of the Statute of Frauds, and where *non constat* but that in the answer the defendant might have admitted the contract.

(g) *Lindsay v. Lynch*, 2 Sch. & Lef. 1

agreement was a mere proposition; and the plaintiff admitted the parol agreement, claiming some modifications and insisting on the written agreement, the court dismissed both bills; the plaintiff had strongly insisted on the Statute of Frauds.^(h) In a case in 2 Vesey Senior, it was suggested that the plaintiff cannot adopt the contract set up in the answer.⁽ⁱ⁾ The admission in an answer of another contract than that declared on does not satisfy the Statute of Frauds.^(j)

§ 536. There are some instances of the court having refused to enforce an oral contract within the Statute of Frauds, although the latter has not been set up. Thus in a Kentucky case it was said that the mere fact of the defendant, failing to set up the Statute of Frauds will not cause specific performance to be decreed if the plaintiff does not prove his case or the defendant admit it;^(k) for if the contract is not shown the plaintiff cannot recover.^(l)

Where a plaintiff seeking specific performance alleges a written contract, he cannot afterwards prove an oral one and claim that it should be enforced because the defendant has not pleaded the Statute of Frauds.^(m) And in a New Jersey case written evidence of an express trust was required by the Chancellor, though the trustee failed to answer.⁽ⁿ⁾

The failure of the guardian of an infant to set up the Statute of Frauds will not cause an oral sale of the land by the infant's ancestor to be specifically enforced against the infant.^(o) In an Illinois case it was said that where a guardian admits the allegation of a bill, the Court of Chancery, as general guardian of infants, may compel the defendant to put in a new plea denying the plaintiff's case, and so require the latter to prove his case; but the court will not make the guardian plead the Statute of Frauds.^(p) Where

(h) *Hosier v. Read*, 9 Mod. 86.

(i) *Legal v. Miller*, 2 Ves. Sr. 299.

(j) *Brown v. Brown*, 33 N. J. Eq. 659.

(k) *Fowler v. Lewis*, 3 A. K. Marsh. 445.

(l) *Hudson v. King*, 2 Heisk. 571.

(m) *Taylor v. Merrill*, 55 Ill. 58. The *allegata* and *probata* must agree; *Bacon v. Eccles*, 43 Wis. 233.

(n) *Smith v. Howell*, 3 Stockt. 349.

(o) *Hood v. Bowman*, 1 Freem. Ch. (Miss.) 292; *Grant v. Craigmiles*, 1

Bibb, 209; see *Prutzman v. Pitesell*, 3 Harr. & Johns. 77.

(p) *Thornton v. Henry*, 2 Scamm. 220. See *Force v. Dutcher*, 18 N. J. Eq. 402, for an admission by executor insufficient to satisfy the Statute of Frauds.

a husband before marriage promised to make a certain settlement on his wife, but failed to do so, and instead conveyed his property to children of a previous marriage, reserving only a life estate to himself, he cannot, in his answer to a bill brought by her, waive the marriage clause of the Statute of Frauds as against the children; but the oral evidence was let in on the ground of fraud.(q)

§ 537. A defendant may admit the oral contract in suit, and yet, by denying all liability thereunder or by setting up the Statute of Frauds, obtain the benefit of the latter.(r)

The establishment of the doctrine just stated was a gradual one in England; and the objection that, if the contract was admitted, the object of the Statute of Frauds no longer applied, had a great weight in the minds of the earlier judges. The tendency of the rules of pleading in equity being to compel an answer of some kind from the defendant, the latter was obliged either to make untrue statements and render himself liable to an indictment for perjury, or, on the other hand, to admit the oral contract. Unless, therefore, he could couple this admission with a claim of the benefit of the Statute of Frauds, the effect of the latter was excluded from all equitable proceedings. Had the doctrine of part performance not been laid down, the defendant might have been allowed to simply plead the statute, and, without making any answer, end the case; but it was thought by the chancery judges that to permit this course would have been in many cases to deprive the plaintiff of the benefit of his part per-

Defendant may admit the oral contract, and yet set up the Statute of Frauds.

- (q) *Petty v. Petty*, 4 B. Mon. 217. & J. 129; *Ogden v. Ogden*, 1 Bland, 287; *Box v. Stanford*, 13 Sm. & M. 96; *Stewart v. Careless*; *Eyre v. Ivison*, Metcalf v. Brandon, 12 Reporter, 52 cited in *Whitchurch v. Bevis*, 2 Bro. (S. C. Miss.); *Wildbahn v. Robidoux*, C. C. 563; *Whitbread v. Brockhurst*, 11 Mo. 660; *Breckenkamp v. Rees*, 3 1 Bro. C. C. 404; *Cooth v. Jackson*, Mo. App. 585; *Brown v. Brown*, 33 N. 6 Ves. Jr. 12; *Bladen v. Bradbear*, 12 J. Eq. 659; *Passaic Co. v. Hoffman*, 3 Ves. Jr. 471; *Jackson v. Oglander*, 2 3 Daly, 504, 505; *Champlin v. Parish*, Hem. & Mil. 472; considering *Bailey v. 11 Paige, Ch. 408; Haight v. Child*, 34 Sweeting, *Saunderson v. Jackson*; *Haigh Barb. 191; Barnes v. Teague*, 1 Jones, v. *Kaye*, L. R. 7 Ch. App. 473; *Thompson Eq. 279; Bonham v. Craig*, 80 N. Car. v. *Tod*, 1 Peters, C. C. 388; *Union 228; Gulley v. Macy*, 84 N. Car. 441; Mutual Ins. Co. v. *Commercial Ins. Co.*, Buck v. Copland, 2 Call, 218; *Heth v. 2 Curtis, C. C. 544; Sorrell v. Sorrell*, 4 Woolridge, 6 Rand. 607; *Capehart v. Ark. 301; Ash v. Daggy*, 6 Porter (Ind.) Hale, 6 W. Va. 550; *Whiting v. Gould*, 259, 260; *Fowler v. Lewis*, 3 A. K. 2 Wis. 594. *Marsh. 445; Hamilton v. Jones*, 3 G.

formance, and indeed, once letting into the controversy the question of part performance, it was fairer to the defendant himself that the latter's version of the transaction should be heard. Obviously an answer being required, the benefit of the Statute of Frauds must be expressly saved to even a defendant who admits having made the oral contract.

The growth of the modern rule can be given by taking the cases in chronological order. Thus Lord Bathurst said that it was enough to do away with the Statute of Frauds that the oral agreement is sufficiently shown the court even by answer.(s)

In a case in 4 Vesey, Lord Loughborough said that there was much question as to this point; and in a certain case in Atkyns, Lord Hardwicke did not, as was claimed, decide that after an admission the defendant could not set up the statute.(t) Cooth v. Jackson, in 6 Vesey, a much considered case, settled the law; Lord Loughborough, when the matter was before him, overruled a plea of the statute coupled with an answer to the merits as being double, but allowed the defendant the benefit of the statute at the hearing. When the case came on later before Lord Eldon, the latter decided that the admission of the oral contract and a claim of the benefit of the Statute of Frauds were consistent, and asked why compel the defendant, as was the rule, to answer as to part performance, where the agreement has been admitted, and the Statute of Frauds set up, if the latter is negatived by the admission.(u)

Lord Chief Justice Eyre sitting in chancery said: "I know Lord Thurlow entertained great doubts on that question, but the Court of Exchequer formerly say that where a defendant insists on the benefit of the statute his admission shall not bind him, for it has been determined that in many cases a defendant cannot protect himself by the statute from answering the fact that such a parol agreement was or was not made, it would be the grossest injustice in the world after making him answer, to turn that admission into the very ground of taking the case out of the statute." (v)

The well-known case of *Rondeau v. Wyatt*, which settled an-

(s) *Popham v. Eyre*, Lofft, 808.

this case in *Rowe v. Teed*, 15 Ves. 372.

(t) *Moore v. Edwards*, 4 Ves. Jr. 23; see *Muckleston v. Brown*, 6 id. 68, Sumner's note.

See *supra*.

(v) *Walters v. Morgan*, 2 Cox, Ch. 370, and note.

(u) 6 Ves. 16; see a consideration of

other important question, is not without authority upon the present point also. It was an action at law for the non-performance of a verbal contract within the Statute of Frauds. A bill in equity had previously been filed, and an answer made thereto admitting the oral agreement, but setting up the statute; and Lord Loughborough, seeming to think that even in equity an admission did not bind under the circumstances, held that at law it certainly did not; and that, by a demurrer which admits everything, advantage might be taken of the statute. He said that the argument that the admission removing the danger of perjury took the case out of the Statute of Frauds was bad reasoning, and the act had another object, namely, to know when the sale was complete; and this, in the case of a sale of chattels, was not till a writing executed, or earnest paid, or part acceptance had.(w)

§ 538. In America, as has been said, the English doctrine is generally followed.(x) There has been, however, some doubt expressed.(y) In an Iowa case it was held under the Revised Statutes of Iowa, which, providing that certain contracts, &c., shall be in writing, go on to say that "the above regulations relating merely to the proof of contracts, do not prevent the enforcement of those not denied in the pleadings," that the defendant, if he admits or does not deny in his answer the contract sued on, cannot set up the Statute of Frauds, and it, the contract, may be enforced though the defendant asserts that it was unwritten, and though he claims the benefit of the statute.(z)

Under this statute the defendant's version of a contract, if he is called upon to testify, is equivalent to a writing, and cannot be contradicted.(a) But may be used against him.(b) The rule applies to contracts not to be performed within a year.(c) When the vendor called as a witness proves the sale, and perhaps in other

(w) 2 H. Bl. 63.

(z) See above, *Thompson v. Jameson*, 1 Cranch, C. C. 247, denying the assertion to the contrary in *Pow. on Contr.*, I. 291.

(y) *Reedy v. Smith*, 42 Cal. 250; *Hutchinson v. Hutchinson*, 4 Desaus. 79; see also *Brooklyn Oil Ref. Co. v. Brown*, 38 How. 446.

(z) *Auter v. Miller*, 18 Ia. 410, citing authorities as to the common law apart from the Iowa statute.

(a) *Id.*; *Hunt v. Coe*, 15 Ia. 197; *Anderson v. Simpson*, 21 id. 404; *Sternburg v. Callanan*, 14 id. 259; *Smith v. Phelps*, 32 id. 539.

(b) *Smith v. Phelps*, 32 Ia. 537.

(c) *Byerlee v. Mendel*, 39 Ia. 384.

cases, oral evidence is admissible to show title in land.(d) Oral testimony of the defendant's agent will be sufficient.(e)

A point for the court which states that if the promise was to answer for the debt, &c., of a third person (following the tenor of the Statute of Frauds), it is within the latter and must be in writing, must be refused, because the promise may have been proved by the testimony of the person sought to be charged within the exception to the act.(f) Where an oral contract of sale of land is proved by the testimony of one of the defendants, the Statute of Frauds cannot be availed of.(g) Under a similar law a similar ruling was made in Louisiana, and an exception to answers to interrogatories that "partition of real estate must be proved by written act of partition," is not to be sustained; parol partition as well as sale of real property can be proved by propounding interrogatories, and such interrogatories cannot be contradicted by parol.(h)

Where land has been delivered and the party on interrogatories acknowledges the contract, the latter though verbal will be enforced.(i)

The law of Louisiana requires proof of sales of immovables to be in writing, but when actual delivery has been made a verbal sale may be proved by interrogatories propounded to either vendor or vendee; the reply to which would be a confession of title. The suit was for the land.(j) While the defendant's answer to interrogatories, admitting an invalid verbal contract as sufficient, if the answers deny the contract they cannot be contradicted by parol evidence, nor can the answers be disregarded.(k) When a party interrogated upon 'facts and articles' in relation to a verbal contract to transfer real estate, denies the contract, his answers cannot be contradicted by parol evidence; nor is parol evidence admissible to prove such a contract in an action of damages for a breach of it.(l) And the answer of a garnishee can only be overcome by two witnesses, one witness and strong corroborating circumstances, or by written proof.(m)

(d) *Davis v. Strohm*, 17 Ia. 427.

(e) *Burnside v. Rawson*, 37 Ia. 639.

(f) *Lyons v. Thompson*, 16 Ia. 66.

(g) *Dewey v. Life*, 14 Nor. West. Rep. 347; 60 Ia. 361.

(h) *Gusman v. Hearsey*, 26 La. Ann. 251; see *Muggah v. Greig*, 2 La. 595.

(i) *Hoover v. Miller*, 6 La. Ann. 205.

(j) *Haughery v. Lee*, 17 La. Ann. 2;

C. C. Art. 2255.

(k) *Bach v. Hall*, 3 La. 119.

(l) *Marionneaux v. Edwards*, 4 La. Ann. 103, citing cases. See *Bauduc v. Conrey*, 10 Robin. 471.

(m) *Cator v. Merrill*, 16 La. Ann.

137.

In Lower Canada under 10 and 11 Vict. c. 11, a contract within the Statute of Frauds may be proved by the defendant's answer to interrogatories; whether the contract is admitted in the plea, on oath, or in answer to interrogatories, is immaterial.⁽ⁿ⁾ In Lower Canada it was held that where under the old French law a defendant interrogated *sur faits et articles*, who refused to answer, was considered as confessing the claim, he still, under the Canada Statute of Frauds, may be held notwithstanding no writing was given; because by statute 12 Vict. c. 38, s. 89, it is enacted that in commercial cases the parties may be interrogated *sur faits et articles*.^(o)

In commercial cases answers to interrogatories *sur faits et articles* or refusal to answer is equivalent to the memorandum required by the Statute of Frauds, the right to these interrogatories being saved by 12 Vict. c. 38.^(p) It has been said also that an admission by special plea binds, though the general issue be also pleaded.^(q) In Scotland it has been held that a guaranty must by act 1681 be a holograph and have witnesses; and a guarantor who has signed an informal instrument can not be called upon to say whether his signature was genuine or not.^(r) So it was said that a guaranty not in proper form under the act 1681 is not validated by an acknowledgment in the pleadings by the defendants that they had signed the paper.^(s)

Apart from express enactment the testimony of the defendant has no effect to prevent his availing himself of the Statute of Frauds. In an Illinois case it was said: "if what was drawn out of complainant on cross-examination, as above stated, amounts to evidence of his having executed written contracts for the sale of the

(n) *Baylis v. Ryland*, 15 Low. Can. 99; *semble*, in a commercial case, a party can put his antagonist upon interrogatories; *Oakley v. Morrough, Pyke* (Low. Can.), 19; see *Truteau v. Leblanc*, 4 Rev. Leg. (Low. Can.) 566.

(o) *Douglas v. Ritchie*, 18 Low. Can. Jur. 277 (citing *Baylis v. Ryland*; *Fry v. Richelieu Co.*; *Beaudry v. Ouimet*, 9 Low. Can. Jur. 158; *Reeves v. Malhiot*, 8 Low. Can. Jur. 84; *Minor v. Knight*); *Taschereau, J.*, dissenting, considered that the Statute of Frauds of Canada

had done away with the previous law, and that evidence to satisfy the statute is too late after action brought; citing *Bill v. Bament*.

(p) *Levey v. Sponza*, 6 Low. Can. Jur. 185 (Q. B.)

(q) *Viger v. Belliveau*, 7 Low. Can. Jur. 199.

(r) *Edmonstone v. Laing*, 38 Morr. Dec. 17057, but this ruling has been questioned.

(s) *Church of England &c. Ass. Co. v. Hodges*, Sess. Cas. 19 D. 421.

whole or a portion of the land in question to the Roes, for a consideration which had been paid, then it is manifest that it was compelling such party on cross-examination and against his objections, to orally testify, not only to the fact of the execution of such contracts, but to a certain extent to their contents also, without having given him any notice to produce the writings, and when such matter was material to a point in issue in the case.”(t)

§ 539. The time when the objection of the Statute of Frauds may be raised is important. The question of the necessity of a special plea or answer, and the effect of a general denial of liability, has been considered elsewhere, see *supra*. It may be said as a general rule that the objection should be made not later than at the hearing,(u) when the oral proof is offered, and not later.(v) In a Vermont case it was said that “The parol evidence of the agreement given by the plaintiff had been received without objection. Not till ‘the arguments were partly concluded’ did the defendant’s counsel make any point on the fact that the agreement was not in writing. This was quite too late to be available, after the admission of the agreement voluntarily made and without protest by the defendant on the trial and in open court.”(w)

It has been thought that the rule in equity is perhaps not so strict, and it has been held that after confessing the bill the defendant may at the argument set up the Statute of Frauds,(x) but in a case in 6 Vesey it was held that the defendant, having failed in his first answer to set up the statute, cannot do so in a second.(y) Still less can an unsuccessful defendant bring a bill for a rehearing,(z) and in a New York case it was said that where an answer admits the making of an agreement without asserting that it was by parol and therefore void under the Statute of Frauds, the defendant

(t) *Strong v. Lord*, 8 Bradw. 543.

(w) *Montgomery v. Edwards*, 46 Vt.

(u) *League v. Davis*, 53 Tex. 14; *Ei-* 153.

seley v. Malchow, 9 Neb. 179; *David-* (z) *Fowler v. Lewis*, 3 A. K. Mar. 445.

son v. Graves, Riley, Eq. (S. Car.) 231; *Leblanc v. Victor*, 6 Mart. N. S. 356; 3 La. 47.

(y) *Spurrier v. Fitzgerald*, 6 Ves. 554.

(v) *Eiseley v. Malchow*, 9 Neb. 179; *Hay v. Boyd*, 3 Mur. (Sc.) 19; see *Ling- 397.*
gan v. Henderson, 1 Bland, 247.

(x) *Eveland v. Stephenson*, 45 Mich.

cannot object at the hearing, stating that the contract is void at law and that the defendant is not bound to perform the same, is not enough to enable him to avail himself of the Statute of Frauds or to put the complainant on proof of a contract in writing.(a)

The defence of the Statute of Frauds must be called to the attention, either by pleading it, by objecting to the oral evidence, or by asking the court for proper instruction.(b) The plaintiff's objection that the Statute of Frauds was not specially pleaded must be made at the trial, when the answer can be amended.(c)

The duty of the court in the matter is illustrated by one or two cases as follows. Thus an instruction to the jury referring to the Statute of Frauds, but not explaining it, is error.(d) Where it is doubtful whether a promise was sole, collateral, or joint, the case goes to the jury.(e) It is error for the court to make a point of the Statute of Frauds where the parties have not done so.(f) Where a judge in finding facts finds that a party did not promise, this is well founded, though there was such a promise, which was, however, oral and within the statute.(g) Without special circumstances a court will not open a judgment by default to let in a defence of the Statute of Frauds by demurrer or otherwise, nor will a new issue be granted.(h)

§ 540. The weight of authority is that after verdict a writing in cases coming within the Statute of Frauds will be presumed, or the latter be regarded as waived. (i) In a Michigan case, the objection being made that no deed was shown for certain land in suit, the court said that "without some objection seasonably made requiring the documentary rights to be proved by primary

(a) *Vaupell v. Woodward*, 2 Sandf. Ch. 143.

(b) *League v. Davis*, 53 Tex. 14; but a prayer for instruction is too late a point it has been held, *Warren v. Dickson*, 27 Ill. 118.

(c) *White v. Maynard*, 111 Mass. 252.

(d) *Moshier v. Kitchell*, 87 Ill. 20.

(e) *Heywood v. Stiles*, 124 Mass. 275.

(f) *Deutsch v. Bond*, 46 Md. 168.

(g) *Walsh v. Kattenburgh*, 8 Minn.

130.

(h) *McCulloch v. Tapp*, 4 West. L. M. 575 (C. P. Logan Co., Ohio).

(i) *Roe v. Haugh*, 3 Salk. 14; *Hawkes v. Saunders*, Cowp., 289; *Rann v. Hughes*, 7 T. R. 350 n. (a); 4 Bro. P. C. 27; *Foquet v. Moor*, 7 Exch. 875; *Price v. Seaman*, 4 B. & C. 527; *Cook v. Stearns*, 11 Mass. 539; *Kratz v. Stocke*, 42 Mo. 355, citing cases; *Elting v. Vandelyn*, 4 Johns. 237.

evidence, it cannot be allowed to parties to keep back such a point for the consideration of an appellate court, on a request to charge, presenting the point for the first time after the evidence was closed. Secondary evidence admitted without objection is sufficient.”(j) The effect of a verdict in disposing of the right to set up the Statute of Frauds is all the stronger in a court of error. (k)

In a New York case it was said: “There is no exception in the case raising any question under the Statute of Frauds. The statute is not pleaded, nor was there any objection to the proof of the agreement sued upon by oral testimony, nor is there any exception to any finding or conclusion which presents any question under the statute. No such question can therefore be considered on this appeal.”(l) So the plaintiff’s failure to object at the trial that the defendant had not specially pleaded the Statute of Frauds prevents his using the objection on appeal.(m) The general rule, therefore, is that the Statute of Frauds cannot be set up in a motion in arrest of judgment.(n)

Where a defendant verbally urges the Statute of Frauds, but does not ask for a nonsuit, and goes to the jury on the question as to whether he was right in refusing to carry out the contract alleged by the plaintiff, and in the course of the evidence all the oral contract is proved, the defendant, after a verdict against him, cannot raise the point of the statute.(o) But it has been held that the Statute of Frauds is available in arrest of judgment,(p) or, *semble*, on a motion for a new trial.(q) That the plaintiff’s debt was discharged by an oral guaranty valid under the Statute of Frauds, because of the discharge of the defendant, and because of the receipt of funds by the guarantor, can be shown either by plea or on *audita querela*.(r)

§ 541. It is too late to claim in a court of error for the first time the benefit of the Statute of Frauds.(s) Where the record fails

(j) *Burke v. Wilber*, 42 Mich. 328.

(k) *Rowland v. Boozer*, 10 Ala. 635.

(l) *Bommer v. American Spiral Hinge Co.*, 81 N. Y. 470.

(m) *White v. Maynard*, 111 Mass. 252.

(n) *Lee v. Bashpole*, Bull. N. P. 281; *Mott v. Maech*, 2 Swift’s System, 215.

(o) *Walker v. Boulton*, 3 U. C. K. B. O. S. 254.

(p) *Fall v. Hazelrigg*, 45 Ind. 576; *Livesey v. Livesey*, 30 Ind. 398; *Green v. Armstrong*, 1 Denio, 552.

(q) *Trayer v. Reeder*, 45 Ia. 273.

(r) *Bird v. Gammon*, 3 Bingh. N. C. 888.

(s) *Lee v. Bashpole*, Bull. N. P. 281;

to show that the Statute of Frauds was invoked as a defence on the trial, either by pleading it, by objecting to the admissibility of evidence, by asking instructions, or otherwise. In this state of the record, the defendants cannot complain that the court did not give them the benefit of an immunity which they do not appear to have claimed in time.^(t) Where there is nothing on the appeal to show whether a memorandum was sufficient or not under the Statute of Frauds, the court above will not notice the point; the defendant, in making up his case, should furnish this knowledge.^(u)

The objection of the statute when first taken in proceeding in error; appeal from magistrate.

Under a statute requiring all objections to the admissibility of evidence to be taken in the court below, it is too late to object in error that certain oral evidence was inadmissible as tending to alter or contradict a writing.^(v) It will not be assumed on error that there was no other evidence than that set out in the bill of exceptions; if there was anything in the point of the Statute of Frauds, the defendant lost it by not alleging that no memorandum was produced.^(w) The objection of the Statute of Frauds was not allowed to be made on an appeal to the Privy Council from a decision of the Chancery Court of Barbadoes.^(x)

There are two or three instances of an allowance of the Statute of Frauds in an appellate proceeding, where the decision below was *pro forma*.^(y) and where, though the parties not having raised the point it was error for the court below to have done so, yet the court of error will not remand the case and order a new trial

- Comb. 163; Price v. Seaman, 4 B. & C. 527; Megaw v. Molloy, L. R. 2 Irel. 540; Bunting v. Beideman, 1 Cal. 182; McDonald v. Mission View &c. Assoc., 51 Cal. 212; Smith v. Kahill, 17 Ill. 68; Boston v. Nichols, 47 Ill. 356; Cairo R. v. Wooley, 85 Ill. 373; Solomon v. Walpole, 27 Ind. 464; Frazer v. Buder, 3 L. & Eq. Rep. 622 (S. C. Ia.); Trayner v. Reeder, 45 Ia. 273; Kraft v. Great-house, 1 Idaho, 259; see, however, Levy v. Dubois, 24 La. Ann. 401; Taylor v. Smith, 15 id. 416; White v. Maynard, 111 Mass. 252; Burke v. Wilber, 42 Mich. 328; Dalton v. Dalton, 14 Nev. 426; Johns v. Gustin, 2 Th. & Cook, 662; Dows v. Montgomery, 5 Roberts. 453; Bommer v. Amer. Spiral Hinge &c. Co., 81 N. Y. 470; League v. Davis, 53 Tex. 14. See, however, Millin v. Terrill, 23 Ind. 165.
- (t) League v. Davis, 53 Tex. 14.
- (u) Cousinery v. Pearsall, 1 N. Y. Week. Dig. 406 (Super. Ct. N. Y.).
- (v) Gibbs v. Gale, 7 Md. 86.
- (w) Wolfe v. Hauer, 1 Gill, 92.
- (x) Daniel v. Trotman, 1 Moo. P. C. C. 149.
- (y) Loomis v. Newhall, 15 Pick. 166.

where it is plain that the parties will set up the Statute of Frauds.(z) A single authority, however, in Louisiana seems to flatly allow the Statute of Frauds to be pleaded for the first time in the court above.(a)

An appeal from a proceeding before a magistrate is an exception to the general rule; and, owing to the informality of such proceeding, the Statute of Frauds may in the first instance be raised on the appeal. The Statute of Frauds will be presumed to have been pleaded.(b) That no motion in arrest of judgment was possible in a suit before a justice, was assigned as a reason in an early New York case for allowing this exception; the plaintiff's proofs in this case showed an oral contract within the statute.(c)

Where a justice's record showed that he had admitted parol evidence of a guaranty, the court on appeal reversed his decision.(d) A general denial of liability will raise the defence of the statute in a suit before a magistrate.(e) In a suit before a magistrate having no jurisdiction over controversies relating to land, to oust the justice of jurisdiction of the case it must affirmatively appear on the face of the proceedings that the defendant has not accepted a deed of the property, but that the contract is still executory.(f)

It will be well to consult the authorities in the note for the proper forms required in pleading the Statute of Frauds.(g)

(a) *Deutsch v. Bond*, 46 Md. 168.

(b) *Levy v. Dubois*, 24 La. Ann. 401, citing *Merz v. Labuzan*, 23 La. Ann. 747; see, however, *Taylor v. Smith*, 15 id. 416.

(c) *Williams v. Corbet*, 28 Ill. 263; *Comstock v. Ward*, 22 Ill. 248; *Pease v. Alexander*, 7 Johns. 25.

(d) *Green v. Armstrong*, 1 Den. 552.

(e) *Ayres v. Herbert*, Penning. 662.

(f) *McMillen v. Terrill*, 23 Ind. 165; and generally as to the defence of the statute in a suit before a justice, see *Hinchman v. Rutan*, 2 Vroom, 498.

(g) *Cole v. Hynes*, 46 Md. 185.

(g) For a form of a demurrer, *Dan. Ch. Pl. & Pr.* 2087; of a plea, *Id.* 2103; *Sands*, *Suit in Eq.* 290; *Whitw. Eq. Pr.*

(L. L. vol. 62) *607 and notes; *Estee's Pl. II.* 737-40; *Wentw. Pl. III.* 102; *Swain, Pl. & Pr. (Ohio)* 526; *Puterb. Pl. & Pr. (C. L.)* 186-7; *Heyth. Eq. Draft.* 651; p. 654 for plea to a bill for the specific performance of an agreement to lease; see *Chitt. Pl.* 909 for plea to a suit on a guaranty. For form of an answer, *Dan. Ch. Pl. & Pr.* 2117; *Puterb. Pl.* 150; see *Heyth. Eq. Draft.* 597, for a statement in an answer reciting the Statute of Frauds, and claiming the same benefit of it as if pleaded; p. 651 for an answer showing facts repelling the part performance set out in the bill. For form of replication at common law, *Puterb. Pl.* 186-7.

CHAPTER XXIV.

PART PERFORMANCE: GENERAL CONSIDERATIONS.

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| <p>§ 542. Part performance will in equity take contract out of Statute of Frauds.</p> <p>§ 543. The civil-law doctrine.</p> <p>§ 544. The doctrine denied or limited.</p> <p>§ 545. The rule deplored.</p> <p>§ 546. The rule favored.</p> <p>§ 547. The rule strictly construed.</p> <p>§ 548. The rule does not apply at law.</p> <p>§ 549. How far part performance effective at law. Compensation. Implied contract.</p> <p>§ 550. Part performance an equitable doctrine.</p> <p>§ 551. Part performance goes on ground of fraud.</p> <p>§ 552. That the person partly performing should not be treated as a trespasser.</p> <p>§ 553. Where the <i>status quo</i> cannot be</p> | <p>restored, part performance will take contract out of the statute.</p> <p>§ 554. General examples of part performance by change of situation.</p> <p>§ 555. Part performance in the case of equitable titles, leases, &c.</p> <p>§ 556. Gifts; and cases not mere gifts.</p> <p>§ 557. Insufficient part performance of gift.</p> <p>§ 558. Part performance applied to cases of contract not performable <i>infra annum</i>. Trusts, &c.</p> <p>§ 559. The rule applied to contracts as to chattels, guaranties, &c.</p> <p>§ 560. Part performance in case of an incomplete memorandum.</p> <p>§ 561. Part performance generally sufficient, if the non-fulfillment of the contract would prejudice the person so performing.</p> |
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§ 542. ONE of the most conspicuous exceptions which courts have ever made to the positive directions of a statute, is that by which a contract, invalid under the Statute of Frauds, is enforced in equity when partially performed. The doctrine, while not universally accepted, is very generally declared, as the numerous cases hereinafter cited will show.^(a) It has been thought by eminent authorities that not only was the principle of the Statute of Frauds

Part performance will in equity take contract out of Statute of Frauds.

(a) *Tilton v. Tilton*, 9 N. H. 389; *Heisk*, 226; *Dodge v. Wellman*, 1 Abb. App. Dec. 515; *Chittington v. Fowler*, 2 Root, 387; see *Wood on Master*, § 193, p. 375-6; 1 *Lead. Cas. in Eq.* (4th Am. ed.) 1030 *et seq.*, 1018; *Dart. on Vend.* 1030 *et seq.*

Townsend v. Hawkins, 45 Mo. 288; *Allen v. Booker*, 2 Stew. 24; *Ruckle v. Barbour*, 48 Ind. 280; *Ryan v. Dox*, 34 N.Y. 813; *Harsha v. Reid*, 45 N. Y. 416; *Burdick v. Jackson*, 7 Hun, 490; *Hall v. Hall*, 1 Gill, 387; *Rainer v. Huddleston*, 4

laid down in chancery before the 29th of Charles II.; but that the fact^(b) of part performance was recognized as an exception to this rule.^(c)

Lord Chancellor Cowper said that "whenever a parol agreement is begun to be put in execution, and intended to be continued," it would be enforced in equity; and that the remedy at law was forbidden by the Statute of Frauds was an additional reason for giving relief in chancery. It has been said that performance^(d) is in equity equivalent to a writing.^(e) In a Wisconsin case it was held that a promise by a bondholder to the obligor that if he would convey his lands to A., and get his (A.'s) note for the bondholder, he, the latter, would discharge the obligor, is good though oral; following the analogy of part performance.^(f)

§ 543. Though the civil law, in the form in which it prevails in Louisiana, seems to deny the principle of part performance (see § 544), yet as administered in Scotland ^{The civil-law doctrine.} it gives to that doctrine much the same force as does the English system of equity. Thus, where under an oral letting of land the lessee has taken possession and paid rent and improved, he is entitled to a decree that the lessor shall give him a formal lease. *Rei interventus* (i. e. part performance), makes the oral contract valid. (The rent or feu here seems to have been perpetual, i. e. a ground-rent.)^(g) In another decision the Scotch doctrine is defined as follows: "If, after a parol agreement has been made, there is what the law calls *rei interventus*, that is, if there are acts and circumstances following upon the agreement, in performance of it, then it is no longer revocable. It is as valid as if it had

(b) See Sugd. V. & P.; and Spence, Eq. Jur. *ad verb.*

(c) Sugd. V. & P. (p. 152), citing *William v. Nevill*, Tothill, 135 (Holb. ed. 72, pl. 50) (Trin. T. 38 Eliz.), where a bill laying a promise to assure land for ten shillings in hand and £2100 at days was demurred to and allowed, because but a preparation for an action on case; Tothill, on account of his brevity of reporting, is of little authority. See Marvin, Leg. Bib., and Wallace's Reporters.

(d) *Guernsey (Lord) v. Rodbridges*. Gilb. Rep. in Eq. 4.

(e) *Dempsey v. Kipp*, 61 N. Y. 471; 62 Barb. 311.

(f) *Martineau v. May*, 18 Wis. 56.

(g) *Smith v. Marshall*, Sess. Cases, 22 D. 1158; 32 Scotch Jur. 525; see *Edmonston v. Edmonston*, Id. 23 D. 1000 n., for opinion of the Lord Ordinary on this subject. See Burge Conf. Laws, page 523 *et seq.*

been made in writing. This is clearly stated in Bell's Principles (§ 26): '*Rei interventus*,' he says, 'raises a personal exception, which excludes the plea of *locus penitentie*. It is inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obligor, to take place on the faith of an imperfect contract, as if it were perfect, provided they are unequivocally referable to the agreements, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable.'

"That acquiescence will be sufficient to give validity and force to a parol agreement, appears clearly from another passage in Bell's Principles, to which I must also direct your Lordships' attention. 'The principle seems to be that mere acquiescence may, as *rei interventus*, make an agreement to grant a servitude to transfer property binding, or may bar one from challenging a judicial sentence; but that where there is neither previous contract nor judicial proceeding, there must be something more than mere acquiescence; something capable of being construed as an implied contract or permission, followed by *rei interventus*. Where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right.'"(h)

§ 544. Part performance, *semble*, it was said in an early case, does not apply to make an exception to the common-law rule excluding oral evidence to affect a writing, but this was at law;(i) and the doctrine of part performance has been denied in Alabama, and therefore a promissory note given for the (j) price of land of which the vendee had possession is without consideration.(k) In an Indiana case it was held that possession taken

The doctrine denied or limited.

(h) *Bargaddie Coal Co. v. Wark*, 3 Macq. 477; see *Paterson v. Edmington*, *Seas. Cas.* 8 S. 931; 5 Fac. (Oct.) Dec. 577; see *Rutherford v. Rutherford*, Hume, 919. Where A. conveyed to B. by deed, &c., and B. wrote an informal memorandum promising to resell; six judges thought that there was but one transaction and that it was ex-

ecuted, and therefore the informal memorandum was validated; the dissenting judge thought that there was no *rei interventus*. For other Scotch cases see the various heads of this subject.

(i) *Binstead v. Coleman*, Bunb. 65.

(j) *Bates v. Terrell*, 7 Ala. 134; see *Brock v. Cook*, 3 Porter, 466.

(k) *Bates v. Terrell*, *supra*.

and improvements made did not take a parol lease out of the Statute of Frauds, but that the lessor rescinding must give compensation.(l)

The doctrine of part performance does not prevail in Kentucky, it being said that to admit oral evidence(m) of the terms of the contract would be in the teeth of the statute,(n) and that the latter was directed as well against perjuries as frauds; nor was it intended to remedy frauds generally, but that especial fraud accomplished by the perjured evidence of a verbal agreement, and that perjury was as likely in cases of part performance as in any other.(o) But even in Kentucky equitable considerations for relaxing the strict rule of the Statute of Frauds have been admitted; and where a vendee of land, sued on a note for the balance of the price, had been in possession for several years and had obtained indulgence for the price due by giving renewals with security, and the vendor tendering a deed and the vendee not offering to restore possession or proposing to rescind the contract, the plaintiff was allowed to recover.(p)

In Mississippi the rule of part performance is not recognized,(q) and in North Carolina(r) and in Tennessee.(s) But in an earlier Tennessee case the doctrine of part performance was said to have been adopted by implication in adoption of the English statute, of which the rule in question was the equitable interpretation,(t) and the principle was at one time doubted in Texas,(u) though now established.(v)

(l) *Alcorn v. Harmonson*, 2 Blackf. 235; see *post*.

(m) *Kay v. Curd*, 6 B. Mon. 102; see *Brock v. Cook*, *supra*, and *Stephens v. Beavis*, 3 Kent, L. Reporter, 475.

(n) *Grant v. Craigmiles*, 1 Bibb, 209; and see *Holtzclaw v. Blackerby*, 9 Bush, 44, saying, that before there can be part performance there must be an agreement proved.

(o) *Hayden v. McIlvain*, 4 Bibb, 58, citing cases.

(p) *Hill v. Spalding*, 1 Duv. 219; and see *Barnes v. Wise*, 3 T. B. Mon. 170.

(q) *McGuire v. Stevens*, 42 Miss. 730; *Beaman v. Buck*, 9 Sm. & M. 210; *Box v. Stanford*, 13 Sm. & M. 95; *Catlett v. Bacon*, 33 Miss. 282; *Hairston v. Jaudon*, 42 Miss. 380; *Fisher v. Kuhn*, 54 Miss. 483.

(r) *Barnes v. Teague*, 1 Jones, Eq. 277; *Allen v. Chambers*, 4 Ired. Eq. 130; *Plummer v. Owens*, 1 Busbee, Eq., 254; *Dunn v. Moore*, 3 Ired. Eq. 364; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *East v. Dolihite*, 72 N. Car. 566.

(s) *Patton v. McClure*, Mart. & Yerg. 337; *Macey v. Childress*, 2 Tenn. Ch. 450; *Crippen v. Bearden*, 5 Humphr. 129; *Bloomstein v. Clee*, 3 Tenn. Ch. 439 (admitting that fraud was the only case in which there was an exception to the Statute of Frauds); *Hays v. Worsham*, 9 Lea, 592.

(t) *Cox v. Cox*, Peck (Tenn.), 455. See the chapter on the Statute of Frauds.

(u) *Garver v. Stubblefield*, 5 Tex. 557.

(v) *Neatherly v. Ripley*, 21 Tex. 435; *Cox v. Bray*, 28 Tex. 261.

The objections to the doctrine of part performance, which were made as we have seen in the Kentucky decisions, have found an echo in the civil law as the latter prevails in Louisiana, and the court said in an early case in that State: "The general rule is that no verbal sale of immovables or slaves shall be valid, and that no testimonial proof of such sales shall be heard. But, says the appellee, where there has been part performance of the contract, this law ought not to apply; it was not intended for such cases. Weak indeed would be the power of the laws, if their commands could be disobeyed under such pretences. If the sale of an immovable cannot be proved by witnesses, neither can the performance, until the existence of the contract is ascertained. In this case, proving mere possession would have amounted to nothing; proving possession under the sale was the object. But if there was no proof of the sale, how could the witnesses prove possession under it?"(w)

At one time in Pennsylvania the doctrine of part performance was questioned, as being unnecessary in view of the action of damages which lies in that State for the breach of a parol contract relating to land.(x) But in answer to this suggestion it was afterwards said that compensation as such could be as easily obtained in England in equity, notwithstanding the fourth section of the Statute of Frauds, as here, and therefore that the assumption that compensation could not be obtained, could not have been the reason why specific execution in cases of part performance was allowed, and secondly, that the only opposition made to such specific execution was based upon the fourth section, and that therefore where the fourth section is not in force there is less reason to resist specific execution.(y) The board of commissioners of the District of Columbia being compelled by law to contract only in writing, it was held in a Federal decision that an oral promise by the president of the board that certificates of indebtedness issued by the auditor of the board to the plaintiff should be paid if he would hypothecate so as to raise money to go on with the work, was invalid, and this though, owing to the board not paying, the hypothecated certificates had to be sold at a sacrifice.(z)

(w) *Grafton v. Fletcher*, 3 Martin See also *Parker v. Wells*, 6 Whart. 153; (La.), 488. *McKee v. Phillips*, 9 Watts, 85.

(x) *Allen's Estate*, 1 W. & S. 383.

(y) *Pugh v. Good*, 3 W. & S. 57.

(z) *Neuchatel v. District of Colum-*

Prior to 1856 the Courts of Chancery in Massachusetts could not under their then limited powers specifically enforce an oral contract, whether partly performed or not.(a) And where a mortgagee verbally promised the mortgagor's creditors to give up his claim if they would take a second mortgage, which they did, the Statute of Frauds was held to apply.(b) The powers of chancery in that State were however enlarged.(c)

§ 545. The introduction of the exception of part-performance has been frequently deplored,(d) the effect of it being "to improve gentlemen out of their estates."(e) It has been urged that it would have been better to give compensation instead of specific performance.(f) Lord Hardwicke said that the court had gone too far in taking agreements out of the Statute of Frauds, and that he would go no further.(g)

In a Canada case the court said: "This is one of that unsatisfactory class of cases in which it is sought to enforce, specifically, performance of a parol agreement. Where parties will not reduce their agreements to writing, they ought not to be surprised that the

bia, 17 Ct. of Cl. 398; see *Burchiel's Case*, 4 Ct. of Cl. 550.

(a) *Buck v. Dowley*, 16 Gray, 557; *Jacobs v. The R. R.*, 8 Cush. 225. And in Maine see *Patterson v. Yeaton*, 47 Me. 315; *Wilton v. Harwood*, 23 Me. 134.

(b) *Parker v. Barker*, 2 Metc. (Mass.) 423.

(c) *Whelan v. Sullivan*, 102 Mass. 206; *Glass v. Hulbert*, 102 Mass. 33; see, for comments upon the Massachusetts law, *Beardsley v. Duntley*, 69 N. Y. 582; as to the rule in Wisconsin, see *Smith v. Finch*, 8 Wis. 249. In Maine since February 28th, 1874, specific performance on account of part performance will be granted.

(d) *O'Reilly v. Thompson*, 2 Cox, 271; *Caldwell v. Carrington*, 9 Peters, 103; *Allen v. Booker*, 2 Stew. 21; *Brock v. Cook*, 3 Porter (Ala.), 464; *Keatts v. Rector*, 1 Ark. 416; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Boyd v. Stone*, 11 Mass. 346; *Charpiot v. Siger-*

son, 25 Mo. 64; *Lane v. Shackford*, 5 N. H. 132; *Wallace v. Brown*, 2 Stockt. 308; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Niven v. Belknap*, 2 Johns. 587; *German v. Machin*, 6 Paige, Ch. 292; *Massey v. McIlwain*, 2 Hill, 426; *Gangwer v. Fry*, 17 Pa. St. 495; *Moore v. Small*, 19 Pa. St. 461; *Blakeslee v. Blakeslee*, 22 Pa. St. 243; *Hall v. Hall*, 2 McCord, Ch. 272; *Church of Advent v. Farrow*, 7 Rich, Eq. 382; *Townsend v. Sharp*, 2 Overt. 192; *Patton v. McClure*, Martin & Yerg. 333; *Anthony v. Leftwich*, 3 Rand, 224. See 16 Am. Jur. 294.

(e) *Lindsay v. Lynch*, 2 Sch. & Lef. 4.

(f) *Toole v. Medlicott*, 1 Ball & B. 404; *Mims v. Lockett*, 33 Ga. 16. See Fonbl. Eq. I. 1182, n. (e), as to some of the difficulties of the doctrine of part performance.

(g) *Middleton (Lord) v. Wilson*, cited in *Popham v. Eyre*, Loft, 801.

court hesitates to perform them. It is, I think, to be regretted that this exception to the application of the Statute of Frauds is now-a-days upheld. In times shortly after the passing of the statute, where part performance was permitted to remove a case from its operation, the art of writing was not so generally practiced as now. Men had been accustomed by open acts of change of possession, unaccompanied by writing or deed, to deal with real estate, and it might well have been considered a hardship in many cases to deprive illiterate men of rights which, notwithstanding the statute, continued thus to be created.”(h) Lord St. Leonards once introduced a bill abolishing part performance, but nothing came of his attempt.(i) Chancellor Zabriskie, speaking of the Statute of Frauds, said: “This salutary statute should not be lightly dispensed with; and the uncertainty and unreliability of much of the evidence in this case shows the wisdom of that statute, and throws a doubt over the doctrine of equity that part performance will take a case out of it. The frauds and perjuries are transferred from the evidence of the contract to that of its performance.”(j)

§ 546. It should be observed, however, that if the proof of the part performance fulfills all the requirements hereinafter set forth, there will be found a great difference so far as ^{The rule} ~~regards~~ ^{is} favored. the danger of perjury between evidence of acts more or less notorious in character, and a secret agreement between the parties.

In a late Nebraska case the court, after admitting that there was eminent authority for holding a strict rein over the exception of part performance, said that this doctrine itself must be conceded unless the statute was to be made an instrument of fraud, and added: “And, indeed, it has often seemed to me that the acts of parties, either in the whole or part performance of an alleged contract, nearly or quite contemporaneously with the making of the same, while they generally act in reference to the contract and not in reference to disputes or lawsuits which may thereafter arise, generally furnish a more reliable key to the true intent and meaning of a contract than even the writing itself, when drafted by an unskillful or dishonest hand.”(k)

(h) Nicol v. Tackaberry, 10 Grant, 115.

(j) Eyre v. Eyre, 19 N. J. Eq. 102.

(i) See 2 Leg. Obs. 150, where the measure is given.

(k) Hanlon v. Wilson, 10 Neb. 141.

The principle of part performance is one not confined to the Statute of Frauds, but has been invoked to sustain contracts invalid for other reasons, as for example, those of a corporation *ultra vires*.(l) The doctrine of part performance has been extended in California by legislative enactment.(m)

§ 547. The doctrine of part performance is strictly construed.(n)

The rule strictly construed.

It has been said in Pennsylvania that the "attempts to turn an experimental investiture of possession into a sale or gift executed, are of such frequent occurrence as to require the courts to hold a strict hand over them."(o) And where the tendency of land is to increase rapidly in value the rule should be especially strict.(p) And also where "the party to the suit can be a witness on his own behalf to substantiate not only the parol agreement but also every material fact to prove a performance of all the conditions of the contract on his part."(q)

§ 548. The rule of part performance does not apply at law, being confined to equity.(r) The only authority to the contrary is

(l) See Green's Brice's Ultra Vir. 38.

(m) Civ. Code, Cal. 1874, § 1741.

(n) Forster v. Hale, 5 Ves. Jr. 314; Buckmaster v. Harrop, 7 Ves. 341; Reynolds v. Waring, Younge's Ch. 346; Phillips v. Edwards, 33 Beav. 441; Nunn v. Fabian, 35 L. J. Ch. 141; L. R. 1 Ch. App. 35; Cameron v. Spiking, 25 Grant, 117; Eastburn v. Wheeler, 23 Ind. 307; Nay v. Mograin, 24 Kan. 78; Smith v. Crandall, 20 Md. 500; Weed v. Terry, 2 Doug. (Mich.) 351; Ham v. Goodrich, 33 N. H. 36; Walker v. Hill, 7 C. E. Green, 519; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 280; Malins v. Brown, 4 Comst. 407; Syler v. Eckhart, 1 Binn. 350; Cox v. Cox, 26 Pa. St. 381; Thomson v. Scott, 1 McCord, Ch. 38.

(o) Wack v. Sorber, 2 Whart. 392.

(p) Shropshire v. Brown, 45 Ga. 179.

(q) Brown v. Lord, 7 Or. 309.

(r) O'Herlihy v. Hedges, 1 Sch. & Lef. 125; Hitchcock v. Hicks, cited in 1 Esp. 163; Pembroke v. Thorpe, 3 Swanst. 442; Johnson v. Hanson, 6 Ala. 351; Cope v. Williams, 4 Ala. 362;

Brockway v. Thomas, 36 Ark. 518; Anthony v. Hunt, 31 Ark. 481; Eaton v. Whitaker, 16 Conn. 229; Warner v. Hale, 65 Ill. 396; Creighton v. Sanders, 89 Ill. 583 (citing cases); Barickman v. Kuykendall, 6 Blackf. 22; Sailors v. Gambril, Smith (Ind.), 82; Orear v. Botte, 3 B. Mon. 360; Dugan v. Gittings, 3 Gill, 156, 162; Kidder v. Hunt, 1 Pick. 328; Thompson v. Gould, 20 Pick. 138; Adams v. Townsend, 1 Metc. (Mass.) 485; Freeport v. Bartol, 3 Greenl. 345; Patterson v. Cunningham, 3 Fairf. 512; Norton v. Preston, 15 Maine, 16, 17; Glenn v. Rogers, 3 Md. 322; Payson v. West, Walker's Rep. 515; Townsend v. Hawkins, 45 Mo. 288; Lane v. Shackford, 5 N. H. 132, 133; Banghart v. Flummerfelt, 43 N. J. Law, 31; Jackson v. Pierce, 2 Johns. 223; Abbott v. Draper, 4 Denio, 54; Cagger v. Lansing, 43 N. Y. 550; Harsha v. Reid, 45 N. Y. (1 Hand) 416; Davis v. Moore, 9 Richards. Law, 219; Porter v. Gordon, 5 Yerg. 102; Buck v. Pickwell, 27 Vt. 163; Wilde v. Fox, 1 Rand. 165.

a *dictum* of Buller when sitting on one occasion for the Lord Chancellor,^(s) and another by Lord Kenyon when Master of the Rolls, who thought that in a very clear case part performance would be allowed even at law, and who stated that he had found upon inquiry that this was the opinion of the judges of the King's Bench.^(t) Lord Mansfield, it is true, had given his assent to the proposition that the decision in a court of law would be the same on the Statute of Frauds as in a court of equity as to the rules which would govern it, though the method of relief and the mode of giving it and the subject of jurisdiction might be different.^(u) Lord Eldon was of the opposite opinion, and gave as his reason the inadequacy of the common-law machinery to enforce this right. And *Brodie v. St. Paul* has been denied at law as well^(v) as in equity.^(w)

The later English rule has been followed in America and at law. Part performance has no effect in taking a contract out of the Statute of Frauds.^(x) See 17 & 18 Vict. c. 125, s. 83 and 86, and 19 & 20 Vict. c. 102 Ir., s. 85, 88, as to their effect in enabling courts of common law to take the same view as equity does of the doctrine of part performance. Speaking of part performance the court in a Massachusetts case said: "Such a doctrine has, under proper limitations, often been recognized in the courts, of equity, where it was required in furtherance of justice and to prevent manifest fraud; but it has obtained no permanent sanction as a principle of jurisprudence in the courts of law."^(y)

(s) *Brodie v. St. Paul*, 1 Ves. Jr. 333.

(t) *Denton v. Smart*, 1 Cox, 258; see also *Whitbread v. Brockhurst*, 1 Bro. C. C. 404.

(u) *Montacute v. Maxwell*, Loft, 331.

(v) *Cooth v. Jackson*, 6 Ves. Jr. 17; see *Norton v. Preston*, 15 Me. 16.

(w) *Rondeau v. Wyatt*, 2 H. Bl. 63; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

(x) See the cases cited *supra*, n. (r). *Norton v. Preston*, *supra*; *Johnson v. Harrison*, 6 Ala. 351.

(y) *Adams v. Townsend*, 1 Metc. (Mass.) 485, the court saying that the doctrine of part performance was available at law "was repudiated by this court as early as the case of *Sherburne*

v. Fuller, 5 Mass. 138, and in the subsequent cases of *Kidder v. Hunt*, 1 Pick. 328, *Griswold v. Messenger*, 6 Pick. 517, and *Thompson v. Gould*, 20 Pick. 134. A similar rule has prevailed in the courts of New York, *Jackson v. Pierce*, 2 Johns. 223, and in the courts of Maine, *Freeport v. Bartol*, 3 Greenl. 345; *Norton v. Preston*, 3 Shepley, 14. In the English courts a similar doctrine was held in *Rondeau v. Wyatt* and *Cooth v. Jackson*; Lord Eldon, in the case last cited, holding a different view of the law on the subject, from that which had been intimated in the earlier case of *Brodie v. St. Paul*. The *dicta* in *Davenport v. Mason* were questioned.

In a recent case in West Virginia, it was said that whether a remedy for even compensation for acts of part performance lay at law, the remedy was inadequate.(z) It has been held that under the modern English rule permitting equitable pleas at common law, it was no defence to an action of (a) trespass *quare clausum fregit*, that the defendant was the vendee by parol of timber sold him by the plaintiff's devisor, and, acting under this agreement, had entered upon the land to cut the timber, had cut and paid for same, and in pursuance of the same contract had committed the trespass in suit.(b) An invalid oral lease partly performed is not a defence to an action for forcible detainer.(c) And to an action for rent, a parol agreement to purchase together with entry into possession is no defence.(d)

Where the declaration averred, as the consideration of the defendant's promise, the plaintiff's agreement to become the tenant of a certain house and furniture, if the house were furnished within a reasonable time, and the Statute of Frauds is pleaded, a demurrer to the latter plea stated that the defendant's promise to give a lease and furnish the house related only to personalty, and that the plaintiff's promise was the consideration, and had been performed. It was held that the Statute of Frauds applied.(e) The vendor cannot recover at law the price of land orally sold by reason of any part performance.(f) And where a vendor agreed to sell and deliver a deed in *escrow*, and did so deliver and received part payment; he cannot at law recover against the vendee who procures and sets up an adverse title.(g)

§ 549. It cannot be said that the part performance of an oral con-

How far part performance effective at law; compensation; implied contract.

tract is in no way recognized at law, for there is authority for the recovery of compensation (see chapter XXVIII.); and where the partial or total execution gives rise to an implied contract, the latter is not affected by the Statute of Frauds.(h) As to compensation for money

(z) *West Virginia Land Co. v. Vinal*, 14 W. Va. 686.

(a) See the Common Law Procedure Act of 1854.

(b) *Wakley v. Froggatt*, 2 H. & C. 674; and see *Anthony v. Hunt*, 31 Ark. 481, saying that part performance might avail at law as having the effect of a license only.

(c) *Ridgley v. Stillwell*, 28 Mo. 403.

(d) *Anthony v. Hunt*, 31 Ark. 481.

(e) *Mechelen v. Wallace*, 7 A. & Ell. 57.

(f) *Frazer v. Child*, 4 E. D. Smith, 153.

(g) *Townsend v. Hawkins*, 45 Mo. 288.

(h) *Roberts v. Tennell*, 3 T. B. Mon. 247; *Kurtz v. Cummings*, 24 Pa. St. 37; *Gully v. Grubbs*, 1 J. J. Marsh. 387.

paid or expenditure incurred; besides the cases cited hereafter (chap. XXVIII.), see those in the note.(i) But it has been held that the remedy is in equity only.(j) It has been said that part performance was no further available at law than to allow the sums of money expended under the oral contract to be set off in mitigation of damages.(k) And generally a contract partly performed will be recognized at law so far as not to disturb what has been done.(l) As where under a contract to cut and carry away timber, some of the latter is cut and some not, the title in that cut and carried away will be recognized even at law.(m)

Where one party to a contract as to a party-wall had begun to build and had prepared his material relying on the contract, he could go on and finish and sue for the share of the expense; and was not obliged to seek specific performance in equity.(n) In California the distinction between law and equity as given above does not seem to prevail, it being said in an early case: "The defence arising from a verbal contract for the sale of land accompanied with acts of part performance, taking the contract from the operation of the statute is permissible under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendant, instead of by a bill in equity, is to require the court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance and on the other hand, if it should refuse the relief it would call a jury to determine the issue upon the general denial."(o)

§ 550. Part performance is a doctrine of equity; and it is in equity that it forms an exception to the Statute of Frauds.(p) The evidence in the case of part perform-

Part performance
an equita-

(i) *Lane v. Shackford*, 5 N. H. 132; *West Virginia Land Co. v. Vinal*, 14 W. Va. 686 (where the remedy at law was said to be inadequate); *Sailors v. Gambriel*, Smith Rep. (Ind.) 82; *Thomas v. Dickinson*, 14 Barb. 90.

(j) *Gupton v. Gupton*, 47 Mo. 46.

(k) *Keeler v. Tatnell*, 3 Zab. 62.

(l) *Buck v. Pickwell*, 27 Vt. 158.

(m) *Buck v. Pickwell*, *supra*.

(n) *Rindge v. Baker*, 57 N. Y. 213 (two judges dissenting, thought the remedy was in equity).

(o) *Arguello v. Edinger*, 10 Cal. 158.

(p) *Downey v. Hotchkiss*, 2 Day, 225; *Eaton v. Whitaker*, 18 Conn. 231; *Freepport v. Bartol*, 3 Greenl. 345; *Patterson v. Cunningham*, 3 Fairf. 512; *Norton v.*

ble doctrine. ance to be admissible must be such that, if taken to be true, a chancellor would decree specific performance.(g) Mere inability to recover at law is no reason for recovery in equity.(r) But, as has been seen, if there is otherwise good cause for equity to interfere, it is an additional reason for doing so that there is no remedy at law,(s) as to give compensation.(t)

The general rule that a bill for specific performance will not lie when brought after notice, on the complainant's part, that the respondent has put it out of his power to perform the contract, will not prevail where the complainant relies on a parol contract within the Statute of Frauds partly performed, as in this case there is no remedy at law.(u) A complainant in equity, in cases under the Statute of Frauds, must, complying with the ordinary rule, show his own conduct to be free from fault, and that he is ready to do his part;(v) and that he has been active in pressing his claim.(w) In an English case the Lord Keeper sent the parties to law to

Preston, 15 Maine, 16, 17; Owings v. Baldwin, 1 Md. Ch. 122; Adams v. Townsend, 1 Metc. (Mass.) 483; Davenport v. Mason, 15 Mass. 92; Gupton v. Gupton, 47 Mo. 46; Lane v. Shackford, 5 N. H. 132, 133; Kidder v. Barr, 35 N. H. 253; Jackson v. Pierce, 2 Johns. 223; Abbott v. Draper, 4 Denio, 54; Williams v. Pope, Wright (Ohio), 408; Johnston v. Johnston, 6 Watts, 370; Squire v. Whipple, 1 Vt. 69; Hibbard v. Whitney, 13 Vt. 24; Jennings v. Robertson, 3 Grant, Ch. 517.

(g) *McBarron v. Glass*, 30 Pa. St. 134.

(r) *Kirk v. Bromley*, 2 Phill. Ch. 648.

(s) *Guernsey (Lord) v. Rodbridges*, Gilb. Rep. in Eq. 4.

(t) *Gupton v. Gupton*, 47 Mo. 46; *Jervis v. Smith*, Hoff. Ch. 472.

(u) *Jervis v. Smith*, Hoff. Ch. Rep. 472.

(v) *Evans v. Folsom*, 5 Minn. 428; *D'Wolf v. Pratt*, 42 Ill. 207; *Evans v. Lee*, 12 Nev. 399; *Kinney v. Redden*, 2 Del. Ch. 46; *McClellan v. Darrah*, 50 Ill. 253; *Arnold v. Trice*, 39 Ga. 511.

(w) *Walker v. Aicklin*, 2 Munf. 359; *Cooper v. Carlisle*, 17 N. J. Eq. 530; *Powis v. Dynevor*, 35 L. T. N. S. 940;

Winans v. La Grange, 3 City Hall Rec. (N. Y.) 155 (Kent, Ch.); *Marshall v. Peck*, 91 Ill. 193; see *Story, Eq. Jur.*, 12th ed., § 769, § 780.

An example of this will be found in *McClellan v. Darrah*, 50 Ill. 253, where a suit for specific performance was brought by McClellan against Darrah. Darrah was in possession of the land under agreement to purchase from C.; he verbally sold to McClellan, who, not being able to pay the purchase-money, borrowed it of W. at ten per cent. W. did not trust McClellan, and at the latter's agreement took Darrah's note at ten per cent. McClellan went into possession and made some improvements. Darrah afterwards obtained a deed from C. to McClellan, but which he refused to deliver to McClellan, because the latter would not pay him (Darrah) the same interest which he was obliged to pay W. Darrah afterwards surrendered to C. the deed running to McClellan, and took another to himself. McClellan afterwards tendered the full amount of the price and ten per cent. interest; but it was held to be too late, and the bill was dismissed.

LAW OF EVIDENCE IN CIVIL ISSUES.

WITH SPECIAL REFERENCE TO THE MODERN IMPROVEMENTS
IN THE LAW.

BY

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ground of fraud. After one party has partly performed it would be fraud for the other party to refuse to go on.(a)

In a case not affected by the Statute of Frauds it was said that it was not the making of improvements, &c., on another's property which entitled the person so doing to hold the property or the improvements, but the fraud of the owner who encourages the expenditure.(b) In another instance, there being a doubt as to an expressed contract, an implied contract was raised on the ground of estoppel where the vendor permitted the improvements to be made on land under a claim of right.(c) And so *a fortiori* where there is an express contract.(d) Another way of stating the rule under discussion is to say, that where there is part performance and fraudulent breach of contract the statute does not apply.(e) But mere breach of the contract is not necessarily fraud.(f) The difference between the doctrine of part performance and that of full performance is that the former rests on the ground of fraud, the latter on that of a compliance with the statute.(g)

§ 552. One of the oldest though not one of the most satisfactory reasons given for the rule of part performance is, that without such a rule the party so performing might be treated as a trespasser, which would be unjust.(h) This

(a) *Keatts v. Rector*, 1 Ark. 411; *Burnett v. Blackmar*, 43 Ga. 576.

(b) *McGarrity v. Byington*, 12 Cal. 431.

(c) *Campbell v. Mayes*, 38 Ia. 12.

(d) *Miller v. Miller*, 60 Pa. St. 22.

(e) *Hidden v. Jordan*, 21 Cal. 92.

(f) *Sands v. Thompson*, 43 Ind. 21.

(g) *Walsh v. Rundlette*, 2 McArthur, 120.

(h) *Morphett v. Jones*, 1 Swanst. 181; *Ex parte Storer*, Davies' Rep. 297; *Arguello v. Edinger*, 10 Cal. 150; *Weber v. Marshall*, 19 Cal. 460; *Carlisle v. Fleming*, 1 Harring. 427; *Burnett v. Blackmar*, 43 Ga. 569; *Graham v. Theis*, 47 Ga. 483; *Chastain v. Smith*, 30 Ga. 96; *Eastburn v. Wheeler*, 23 Ind. 305; *Ricker v. Kelly*, 1 Greenl. 117; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Semmes v. Worthington*, 38 Md. 298; *Ham-*

ilton v. Jones, 3 Gill & J. 127; *Maryland Savings Inst. v. Schroeder*, 8 G. & J. 94; *Boyd v. Stone*, 11 Mass. 346; *Glass v. Hulbert*, 102 Mass. 24; *Farrar v. Patton*, 20 Mo. 81; *Tilton v. Tilton*, 9 N. H. 389; *Ham v. Goodrich*, 33 N. H. 32; *Kidder v. Barr*, 35 N. H. 253; *Gilbert v. Trustees of Newark*, 1 Beasley, 181; *Johnson v. Hubbell*, 2 Stockt 332; *Wallace v. Brown*, Id. 308; *Niven v. Belknap*, 2 Johns. 587; *Town v. Needham*, 3 Paige, 545; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Malins v. Brown*, 4 Comst. 407; *Freeman v. Freeman*, 43 N. Y. 34; *Richmond v. Foote*, 3 Lans. 244; *Hobbs v. Wetherwax*, 38 How. Pr. 385; *Bennett v. Abrams*, 41 Barb. 619; *Lowry v. Tew*, 3 Barb. Ch. 407; *Rhodes v. Rhodes*, 3 Sandf. Ch. 283; *Wilber v. Paine*, 1 Hamm. 253; *Allen's Estate*, 1 W. & S. 385; *Hugus*

reason was said in a late Minnesota case to be but one example of the application of the rule of part performance.⁽ⁱ⁾

not be treated as a trespasser.

§ 553. In the famous case of *Glass v. Hulbert*,^(j) as an argument to show that mere possession taken of land was not part performance, it was said that "mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale, &c., with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property after revocation," &c. This disposes of the trespass theory, and puts the theory of part performance upon its true basis, namely, that where the *status quo* of the parties cannot be restored equity will compel the completion of the contract; and this view is supported by many cases.^(k) The part performance must be such that it is impossible or inequitable to place the parties *in statu quo*.^(l) Especially where damages

Where the *status quo* cannot be restored, part performance will take contract out of the statute.

v. Walker, 12 Pa. St. 173; *Moore v. Small*, 19 Pa. St. 461; *Dougan v. Blocher*, 24 Pa. St. 28; *Patteson v. Horn*, 1 Grant (Pa.), 301; *Toe v. Toe*, 3 Grant (Pa.), 74; *Farley v. Stokes*, 1 Parsons' Eq. Ca. 422; *Overmyer v. Koerner*, 2 W. N. C. 6 (S. C. Pa.); *McKee v. Phillips*, 9 Watts, 85; *Smith v. Smith*, 1 Rich. Eq. 130; *Anderson v. Chick*, 1 Bailey, Ch. 118; *Caldwell v. Williams*, Id. 17; *Hatcher v. Hatcher*, 1 McMull. Eq. 311; *Meach v. Stone*, 1 Chip. 189; *Hazleton v. Putnam*, 3 Chandl. 128; *Smick v. Finch*, 8 Wis. 249; *Paine v. Wilcox*, 16 Wis. 202.

(i) *Pfflner v. Stillwater R. R.*, 23 Minn. 344.

(j) 102 Mass. 24, and see *Wallace v. Brown*, 2 Stockt. 308, for a statement to the same effect.

(k) *Lord Pengall v. Ross*, 2 Eq. Cas. Ab. 46; *Williams v. Morris*, 95 U. S. S. C. 456-7; *Ex parte Storer*, Davis' Rep. 297; *Keatts v. Rector*, 1 Ark. 418,

citing cases; *Edwards v. Estell*, 48 Cal. 196; *Tate v. Jones*, 16 Flor. 239; *Bryan v. South-west R. R.*, 41 Ga. 75; *Haisten v. Savannah R. R.*, 51 Ga. 200; *Eastburn v. Wheeler*, 23 Ind. 307; *Cuppy v. Hixon*, 29 Ind. 523; *Dickerson v. Chrisman*, 28 Mo. 140; *Townsend v. Hawkins*, 45 Mo. 288; *Evans v. Lee*, 12 Nev. 399; *Ewing v. Gordon*, 49 N. H. 458; *Gilbert v. Trustees of East Newark Co.*, 1 Beasley, Ch. 181; *Wallace v. Brown*, 2 Stockt. 308; *Banks v. American Tract Soc.* 4 Sandf. Ch. 469; *Deardorff v. Weaver*, 25 Pittsburg L. J. 62; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. C. 376; *Capehart v. Hale*, 6 W. Va. 550; *West Va. Land Co. v. Vinal*, 14 West Va. 686; *Wright v. Pucket*, 22 Gratt. 374; *Horn v. Ludington*, 32 Wis. 76; and see most of the cases cited above.

(l) *Foster v. Kimmons*, 54 Mo. 493.

would be an inadequate compensation.(m) The agreement, it has also been said, must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation.(n) So in another New York case, where it was held that under the circumstances entire payment of the consideration of the contract was sufficient part performance, inasmuch as the defendant's refusal to go on coupled with his doubtful ability to meet his obligations indicated fraud, and gave the court reason to believe that a recovery at law would be an inadequate remedy to the plaintiff.(o)

Where one of the contracting parties has been induced or allowed to alter his position on the faith of an oral contract within the Statute of Frauds to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute.(p) Whether the rule of part performance rests solely on the ground of fraud is another question; Cotton, L. J., in a recent case said it did not, but that the possession of land implied a contract which the court will proceed to ascertain.(q) In an early Pennsylvania case the court, speaking of the doctrine of part performance, said: "This determination was founded on two principles: 1st, that where the parties have acted upon their agreement, there is no danger of perjury in proving it; and 2d, because it is against equity that a man should refuse to perfect an agreement, from which he had derived benefit by an execution in part."(r)

The strong expression is sometimes used that part performance is equivalent to a writing.(s) In a Pennsylvania case the court said: "The best rule of construction that I have ever seen applied to the Statute of Frauds and Perjuries, is that suggested in some of the English cases, and adopted by the Legislature of Pennsylvania in the act of 10th March, 1818, providing for the

(m) *Hobbs v. Wetherwax*, 38 How. Pr. 388; and see the cases in the previous note; *Williams v. Morris*, 95 U. S. C. 456; *Purcell v. Miner*, 4 Wall. 517; *Morrill v. Cooper*, 65 Barb. 516.

(n) *McIneres v. Hogan*, 61 How. Pr. 447 (N. Y. C. P.)

(o) *Fannin v. McMullen*, 2 Abb. Pr. 225.

(p) *Williams v. Morris*, 95 U. S. C. 457; see *Ponce v. McWhorter*, 50 Tex. 571, where the vendee himself had sold and his vendees had improved the land.

(q) *Brittain v. Rossiter*, 27 W. R. 482; 48 L. J. Exch. 362; 40 L. T. N. S. 240.

(r) *Ebert v. Wood*, 1 Binn. 218.

(s) *Fall v. Hazelrigg*, 45 Ind. 576.

proof and specific execution of the parol contracts of decedents, where such contract shall have been so far in part executed as to render it unjust to rescind the same.”(t)

§ 554. Under the various heads of the present subject will be given examples of every act which equity has determined to be such part performance as will work an exception to the Statute of Frauds. The following, however, will show generally what change of situation constitutes part performance. Thus, where a purchase of land was made under a parol promise that the defendant should discharge certain incumbrances, and the plaintiff paid the defendant the consideration of the contract, the oral promise was specifically enforced, as the recovery of the purchase-money was not an adequate remedy.(u) Where partners owning land under lease make a surrender and accept a new lease involving a different liability, the part performance is sufficient to take the case out of the statute.(v) And the same rule was applied where the part performance consisted of services of a particular character, whose value could not be estimated in money.(w)

General examples of part performance by change of situation.

The test of the change of situation has been applied in that difficult case of a written promise subsequently altered by parol; and it has been said that without such a change of situation on the part of the person setting up the subsequent alteration by parol, the latter is not valid,(x) and so acquiescence by the remainderman in the continuation of a license given by a life tenant upon compensation was held to be insufficient part performance, because an agreement to allow the license to continue works no injury to the licensee.(y) Where no injury is worked(z) or when compensation can be readily given, no exception will be made to the Statute of Frauds.(a)

(t) *Moore v. Small*, 19 Pa. St. 435. S. 432; *Kelley v. Stanberry*, 13 Ohio, See *Clarke v. Vankirk*, 14 S. & R. 408. See under the Scotch law, *Bar-gaddie Coal Co. v. Wark*, 3 Macq. 477.

(u) *Malins v. Brown*, 4 Comst. 407.

(y) *Hamilton v. Jones*, 3 Gill & J.

(v) *Parker v. Smith*, 1 Collyer, Ch. 127.

623.

(z) *Townsend v. Hawkins*, 45 Mo

(w) *Rhodes v. Rhodes*, 3 Sandf. Ch. 288.

281.

(a) *McKowen v. McDonald*, 43 Pa.

(z) *Huffman v. Hummer*, 18 N. J. St. 441.

Eq. 89; *Boyce v. McCulloch*, 3 W. &

§ 555. Contracts relating to the following subjects have been held to be provable orally when partly performed. Equitable titles: thus such a title arising under the purchase of title bonds(*b*) and generally(*c*) leases.(*d*) In the following cases part performance was regarded as not effectual to take certain leases out of the Statute of Frauds.(*e*) Licenses.(*f*) And a parol license on land if acted upon by expenditures thereunder, &c., can only be revoked upon compensation and notice. See "Licenses."(*g*) Though oral authority to a sheriff to sell more land than was necessary to satisfy an execution may, *semble*, be made good by an estoppel as against the principal, if the latter receives the purchase-money and puts the purchaser in possession.(*h*) An agreement to devise.(*i*) A partition.(*j*) And in North Carolina a public parol partition which, when partly performed, is looked upon as a species of livery of seisin.(*k*) An agreement fixing a boundary line.(*l*) An exchange of lands.(*m*) And

(*b*) *Burleson v. Burleson*, 11 Tex. 2; *Ponce v. McWhorter*, 50 Tex. 571.

(*c*) *Kay v. Watson*, 17 Ohio, 30.

(*d*) See "Leases." *O'Connor v. Spaight*, 1 Sch. & Lef. 306; *Aylesford's* (Earl of) *Case*, 2 Strange, 783; *Thornton v. Ramsden*, 4 Giff. 574; *Gaston v. Franklin*, 2 DeG. & Sm. 569; *Gray v. Hill*, Ry. & Moo. 420; *Reddin v. Jarman*, 16 L. T. N. S. 449; *Ungley v. Ungley*, 5 Ch. D. 890; 25 W. R. 734; 22 Moak, 539 n.; *Rice v. O'Connor*, 12 Ir. Ch. 433; 11 Ir. Ch. 514; 7 Ir. Jur. N. S. 112; (County of) *Huron v. Kerr*, 3 Grant, Ch. 267; *Morrison v. Peay*, 21 Ark. 110; *McCarger v. Rood*, 47 Cal. 141; *Crocker v. Higgins*, 7 Conn. 348; *Steel v. Payne*, 42 Ga. 208; *Hixon v. Cuppy*, 33 Ind. 211; S. C. *sub nom.* *Cuppy v. Hixon*, 29 id. 523; *Switzer v. Gardner*, 41 Mich. 166; *Clarke v. City of Cincinnati*, 1 West. Law Jour. 53; *Purcell v. Potter*, Anthon, N. P. 311; *Moore v. Beasley*, 3 Hamm. 296; *Jones v. Peterman*, 3 S. & R. 547.

(*e*) *Myers v. Forbes*, 24 Md. 612 (*dubii*); *Porter v. Gordon*, 5 Yerg. 102

(*semble* at law); *Alcorn v. Harmonson*, 2 Blackf. 235, where the remedy was said to lie in compensation; but see *Cuppy v. Hixon*, *supra*.

(*f*) *Wynne v. Garland*, 19 Ark. 34; *Foster v. Browning*, 4 R. I. 47; *Cook v. Pridgeon*, 45 Ga. 331.

(*g*) *Bush v. Sullivan*, 3 Greene (La.), 344.

(*h*) *Isaacs v. Gearhart*, 12 B. Mon. 233.

(*i*) *Maddox v. Rowe*, 23 Ga. 433; *Stafford v. Bartholomew*, 2 Carter, 153; *Mauck v. Melton*, 64 Ind. 415; *Semmes v. Worthington*, 38 Md. 317; *Mundorff v. Kilbourn*, 4 Md. 462; *Lee v. Carter*, 52 Ind. 342; *Johnson v. Hubbell*, 2 Stockt. 338.

(*j*) *Petray v. Howell*, 20 Ark. 618; *Goodhue v. Barnwell*, Rice, Eq. 236; *Ponce v. McWhorter*, 50 Tex. 571; *Cummins v. Nutt*, Wright (Ohio), 713.

(*k*) *Walker v. Bernard*, 1 Cam. & Norw. 84.

(*l*) *Gove v. White*, 23 Wis. 283. And see "Land."

(*m*) *Gordonier v. Billings*, 1 W. N. C. 422; 77 Pa. St. 601; *Johnston v. John-*

where the plaintiff has fulfilled his part he may recover the purchase price of the land conveyed by him,⁽ⁿ⁾ and such a contract partly performed is at least a justification of an apparent trespass.^(o) The rule is applied to exchange of leaseholds,^(p) and where under a memorandum containing an imperfect description of the land all doubt is removed by possession being taken.^(q)

Where the plaintiff and defendant agreed by parol to exchange lands, and conveyances are made and possession taken, it was held that one term of the parol agreement being that the defendant should discharge a mortgage which was on the land which he had agreed to convey to plaintiff, an action lies to have such mortgage satisfied.^(r) A conveyance by a husband and wife passing her dower and homestead rights is sufficient part performance of a verbal contract that if she would so join in the deed the vendee would convey other land to her.^(s) Equity will sustain an oral agreement rescinding a sale of land where the vendee has not paid the price, and the vendor has taken possession.^(t)

§ 556. Gifts.^(u) In a Virginia case the question of the applicability of the rule of part performance to gifts is elaborately considered.^(v) The same amount of part performance is necessary in the case of a gift as in the

Gifts; and cases not mere gifts.

ston, 6 Watts, 371, 319; *Dock v. Hart*, 7 W. & S. 174; *Prettyman v. Hartley*, 77 Ill. 268; *Ogden v. Ogden*, 4 Ohio St. 190. But contra at law. *Hitchcock v. Hicks*, cited in 1 Esp. 164. See *infra*.

(n) *Baker v. Scott*, 2 Th. & Cook, 607.

(o) *Borst v. Zeh*, 12 Hun, 316.

(p) *Switzer v. Gardner*, 41 Mich. 166.

(q) *Overstreet v. Rice*, 4 Bush, 3.

(r) *Bennett v. Abrams*, 41 Barb. 624.

(s) *Farwell v. Johnston*, 34 Mich. 343.

(t) *Arrington v. Porter*, 47 Ala. 721.

(u) *Dillwyn v. Llewellyn*, 10 W. R. 743; *Neale v. Neale*, 9 Wall. 9; *Bright v. Bright*, 41 Ill. 97; *Kurtz v. Hibner*, 55 Ill. 521; *Wood v. Thornly*, 58 Ill. 466; *Langston v. Bates*, 84 Ill. 534; *Puttman v. Halley*, 24 Ia. 425; *Ford v. Ellingwood*, 3 Metc. (Ky.) 363; *Hall v. Hall*, 1 Gill, 387; *Dana v. Wright*, 23

Hun, 32; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 39; *Syler v. Eckhart*, 1 Binn. 380; *Stewart v. Stewart*, 3 Watts, 255; *Young v. Glendenning*, 6 Watts, 509; *Eckert v. Mace*, 3 P. & W. (Pa.) 364; *Burns v. Sutherland*, 7 Pa. St. 106; *Wible v. Wible*, 1 Grant (Pa.), 409; *Deardorff v. Weaver*, 25 Pittsburg L. J. 62; *McElhenny v. Hope*, Id. 78; *Ackerman v. Fisher*, 57 Pa. St. 457; *McLain v. School Directors*, 51 Pa. St. 196; *Miller v. Miller*, 60 Pa. St. 22; *Thompson v. Gordon*, 3 Strobb. 198; *Keys v. Keys*, 11 Heisk. 430; *Murphy v. Stell*, 43 Tex. 131, 132; *Willis v. Matthews*, 46 Tex. 482.

(v) *Burkholder et al. v. Ludlam et al.*, 30 Gratt. 260-1:—

"Whether a court of equity will compel the conveyance of the legal title of

case of a sale.(w) In an Arkansas case it was said that, although a court of chancery will not decree the specific performance of a mere voluntary agreement, yet, where a donee enters into possession of land under a parol gift, and makes valuable improvements on the land on the faith of the gift, it constitutes a consideration on which to ground a claim for specific performance.(x)

Equity, it was said in Maryland, protects a parol gift equally with a parol agreement to sell, if there has been part performance.(y) Gifts in consideration of marriage are examples of the general principle.(z) Part performance will take out of the Statute of Frauds a parol promise by a parent to make an advancement of certain land.(a)

land claimed under a parol gift, supported by meritorious consideration, and by reason of which the donee has been induced to alter his condition and make large expenditure of money in valuable permanent improvements on the land, is a question on which the authorities are not agreed.

"Some adjudged cases determine the question in the negative. *Pinckard & Pool v. Pinckard's Heirs et al.*, 23 Ala. 649; *Rucker, for, &c. v. Abell et al.*, 8 B. Mon. 566; *Adamson v. Lamb, Adm'r*, 3 Blackf. 446. The doctrine of other cases is, that the donee, under such circumstances, becomes the equitable owner of the land, and may rightfully demand the legal title. *Syler's Lessee v. Eckhart*, 1 Binn. 378; *Eckert et al. v. Eckert et al.*, 3 P. & W. 322; *Eckert v. Mace et al.*, Id. 364; *Stewart v. Stewart*, 3 Watts, 253; *France v. France*, 4 Halstead Ch. 650; *Lobdell v. Lobdell*, 36 N. Y. 327; *Bright v. Bright*, 41 Ill. 97; *Law v. Henry*, 39 Indiana, 414; *Young v. Glendenning*, 6 Watts, 509; *Mahon v. Baker*, 26 Pa. St. 519; *Atkinson v. Jackson*, 8 Ind. 31; *Freeman v. Freeman*, 43 N. Y. 34; *Peters v. Jones*, 35 Iowa, 512; *Neale v. Neale*, 9 Wall. (U. S.) 1.

"The ground of these last-named de-

cisions is, that the parol gift, with the concerning facts established, rests on the same foundation with a parol contract for sale partly performed, and that equity will carry both into complete execution, notwithstanding the Statute of Frauds and Perjuries, for the same reason, to wit, to prevent the statute, which was designed to guard against fraud, from being used as a means to perpetuate fraud."

(w) *Stewart & Stewart*, 3 Watts, 255, considering some cases; see *Bowles v. Wathan*, 54 Mo. 264; *Hughes v. Lindsey*, 31 Ia. 332; *Neale v. Neale*, 9 Wall. 9.

(x) *Guyon v. McCauley*, 32 Ark. 116, citing *King v. Thompson*; *Haines v. Haines*, 4 Md. Ch. 133; *Shepherd v. Bevin*, 9 Gill, 41.

(y) *Hardesty v. Richardson*, 44 Md. 624, citing several cases.

(z) *Dugan v. Gittings*, 3 Gill, 156; *Surcome v. Pininger*, 22 L. J. Ch. 421; 3 De G. M. & G. 571, distinguishing *Lassence v. Tierney*, 1 Mac. & G. 551, as a case where there was no part performance except the fact of the marriage, and citing *Taylor v. Beech*, 1 Ves. Sr. 297, and *Hammersley v. De Biel*; *Hart v. Hart*, 3 Desaus. 592.

(a) *Biehn v. Biehn*, 18 Grant, Ch. 498.

The following cases are of gifts upon a consideration or inducement, and therefore not mere gifts. Thus where the donee for the sake of the gift is asked to make a change of residence or manner of life.(b) And this point has been expressly noticed, and the difference between a gift and the consideration stipulated for as the return for services rendered, has been clearly indicated in a New York case, where a son having worked for his father, received from the latter land of which he took possession and which he improved.(c) Where a donor put the donee into possession of a leasehold, and delivered him the lease, declaring that he did so because the donee married, and gave up a plan for emigrating to another State, and the donee made permanent improvements; it was held that the latter had an equitable title.(d)

An oral promise by one brother to another that the former would give the latter a share of his land, if the latter would not emigrate, but would remain and help in the support of their mother and sister, is good on the ground of part performance.(e) It has been said, however, that coming to live on a farm upon a parol promise of gift gives no right unless the donee incurred some loss by his change; *semble*, apart from the Statute of Frauds, such contract would not be specifically enforced for want of consideration.(f) Where, however, the donee moving upon the land takes charge of it, if a farm, for example, or improves it, the case is clear.(g)

Where a gift is upon the condition that the donee shall put certain improvements upon it, the transaction is not a mere gift.(h) Service by a son for his father after nonage past has this effect.(i) Where personal services to the parent are given, together with care of the land, there is an even stronger case.(j) Where a son, under an oral promise of gift of land from his father, enters and makes

(b) *Bowles v. Wathan*, 54 Mo. 264; *Coles v. Pilkington*, L. R. 19 Eq. 179; *Fitzgerald v. Fitzgerald*, 20 Grant, Ch. 410; *Lamb v. Hinman*, 8 Nor. West. Report. 709. (g) *Knapp v. Hungerford*, 7 Hun, 589; *Law v. Henry*, 39 Ind. 416; *Kay v. Watson*, 17 Ohio, 30.

(c) *McCray v. McCray*, 30 Barb. 635. (h) *Martin v. McCord*, 5 Watts, 494. (i) *Atkinson v. Jackson*, 8 Ind. 32, distinguishing *Adamson v. Lamb*; see *Peters v. Jones*, 35 Iowa, 517.

(d) *Shobe v. Carr*, 3 Munf. 10. (j) *Hill v. Chambers*, 30 Mich. 429; *Lamb v. Hinman*, 8 Nor. W. Reporter, Grant, Ch. 13.

(e) *McDonald v. McKinnon*, 26 Grant, Ch. 13. (f) *Reed v. Vannorsdale*, 2 Leigh, 569.

valuable improvements and gives up offers made him by others, the part performance is sufficient.(k) But a gift of the homestead is not withdrawn from the effect of the Statute of Frauds, and the statutes regulating the transfer of homestead by such part performance by a son, as living on the land and working it; such services will, however, entitle the son to a lien, and he can hold the land until compensated.(l)

§ 557. There have been a number of cases in which the part performance has been ineffectual to prevail against the Statute of Frauds.(m) It has been said that a parol gift of land invalid under 29 Car. II. c. 3 cannot, under stat. 13 Eliz. c. 5, and 29 Eliz. c. 5, be consummated as against creditors.(n) The voluntary character of the gift has been in some instances the obstacle to its enforcement unexecuted.(o) In Pennsylvania, under the act March 10th, 1818 (7 Sm. Laws, 79), and February 24th, 1834, § 13 (P. L. p. 75), which provide for the enforcement by executors, &c., of the written and of the part-performed oral contracts of their decedents.

A gift of land as such cannot be enforced, but the donee when he has partly performed takes as a purchaser, and must make the same measure of proof.(p) Gifts from a parent to a child are watched with a jealous eye because of the probability of the words alleged as constituting the gift being only an unguarded expression of a vague intention.(q) Where a father, in consideration of his sons' taking care of him and of the farm on which they all lived, promised to convey it to them, and they did their part, the part performance was held to be insufficient because not taken under the contract and not being exclusive.(r) And except in a very clear case compensation for the services rendered by the child will be the only recovery allowed.(s)

(k) Bohanan v. Bohanan, 96 Ill. 595; And *semble* not because in parol; Evans v. Langdon v. Guy, 12 N. Y. Week. v. Battle, 19 Ala. 402. Dig. 241.

(l) Speers v. Sewell, 4 Bush, 240.

(m) Adamson v. Lamb, 3 Blackf. 446

(a dictum).

(n) Rucker v. Abell, 8 B. Mon. 568.

(o) Boze v. Davis, 14 Tex. 334; Pinckard v. Pinckard, 23 Ala. 650.

(p) Moore v. Small, 19 Pa. St. 465.

(q) Shellhammer v. Ashbaugh, 83 Pa. St. 28.

(r) Johns v. Johns, 67 Ind. 443.

(s) Shellhammer v. Ashbaugh; Eckert v. Eckert, 3 P. & W. 332. See Bailey v. Edmunds, 64 Ill. 128, for an example of such gift not sustained.

§ 558. Whether part performance will take a case out of the "Year" clause of the 4th section of the Statute of Frauds will be discussed in the chapter treating of contracts within that clause. In the following miscellaneous category will be given some instances of the things and persons affected by the doctrine of part performance.

Part performance applied to cases of contracts not performable *infra annum*; trusts, &c.

Express trusts: and see "Trusts." (t) Mortgages: as the case of an absolute deed shown orally to be a mortgage (u) or a promise to allow a redemption, making the contract analogous to a trust, (v) or where a parol vendee of part of land which had been previously mortgaged insisted, on the ground of his part performance, that the rule of mortgages being charged inversely as the sales should be enforced, (w) and equity will enforce an agreement to give a mortgage on land when the complainant has performed, (x) or where a security on crops in the nature of a mortgage was given. (y) Partnership land, the purchase being regarded as under a trust. (z)

Where a statute required that there should be a written assent by the applicant for a city ordinance permitting the extension of a wharf, it is enough that the applicant extends the wharf, though he gave no written assent to the ordinance. (a) An oral agreement carrying out a family arrangement and compromising doubtful claims, was enforced in equity where the possession of land was taken, long maintained, and accompanied by improvements. (b) Contracts between husband and wife; or in consideration (c) of marriage. (d)

A post-nuptial parol agreement between husband and wife, whereby they agree to live separately, she to renounce dower, support cer-

(t) *Church v. Sterling*, 16 Conn. 400; see *Jamison v. Miller*, 27 N. J. Eq. 590.

(u) *Woodworth v. Carman*, 10 West. Jur. 504.

(v) *Fisher v. Moolick*, 13 Wis. 321; see *Godefroy v. Caldwell*, 2 Cal. 489.

(w) *Root v. Collins*, 34 Vt. 174.

(x) *Dean v. Anderson*, Stew. N. J. Dig. 1006.

(y) *Daniel v. Trotman*, 1 Moore, P. C. C. 149.

(z) *Bissell v. Harrington*, 18 Hun, 84; *Farmer (In re)*; *Griffith (Ex parte)*, 10 Chic. Leg. News, 395; 18 Nat. Bank. Reg. 211. See *Burn v. Strong*, 14 Grant, Ch. 657. See *Lindl. Part. 90*.

(a) *Baltimore (City of) v. White*, 2 Gill, 457.

(b) *Stockley v. Stockley*, 1 V. & B. 30.

(c) *Gosden v. Tucker*, 6 Munf. 1.

(d) *Bowie v. Bowie*, 1 Md. 94.

tain of the children, and he to convey land to her, is partly performed by possession, cultivation, and improvements, and the Statute of Frauds does not apply.(e) An oral promise by a father to his daughter's proposed husband to give his daughter a leasehold, istaken out of the Statute of Frauds by part performance when the couple marry and occupy the house till the father's death, the father paying the rent while he lived.(f)

§ 559. The principle applies to contracts as to chattels.(g) While unlocated a land certificate and location is personalty, but when it is located it becomes a chattel real, and can only be assigned as land itself is,(h) that is, by deed or other written evidence. That the plaintiff parts with his money, relying upon an oral guaranty, does not take the latter out of the Statute of Frauds on the ground of part performance.(i) Speaking of an oral guaranty, the court in a Massachusetts case said that it could not "be made effectual by estoppel merely because it had been acted upon by the promisee, and not performed by the promisor."(j) A corporation is bound by the rule of part performance.(k) Sir John Leach said that if a regular corporate resolution is passed for granting an interest in the corporate property, and upon the faith of that resolution expenditure is incurred, he was inclined to think that both reason and authority would be ground for compelling the corporation to make a legal grant in pursuance of the resolution.(l) Part performance will do away with the objection of non-mutuality which may arise when but one party to the contract executes it.(m) *Seemle*, parol waiver of forfeiture of right under written contract can only be proved when there is part performance under the waiver, and this in equity only,(n) and the

(e) *Thomas v. Brown*, 10 Ohio St. 249.

(i) Even under § 1951 of the Georgia Code; *Daniel v. Mercer*, 63 Ga. 44.

(f) *Ungley v. Ungley*, 5 Ch. D. 890; 25 W. R. 734; 46 L. J. Ch. 854; 37 L. T. N. S. 53; 22 Moak, 539 n.; S. C. below, 4 Ch. D. 75; 35 L. T. N. S. 620; 46 L. J. Ch. 190; 25 W. R. 39; 19 Moak, 683 n.

(j) *Brightman v. Hicks*, 108 Mass. 246.

(g) *Cotterill v. Stevens*, 10 Wis. 423; *Bryan v. Southwestern R. R.*, 37 Ga. 31; *Heermance v. Taylor*, 14 Hun, 149.

(k) *Wilson v. West Hartlepool R. R.*, 2 DeG. J. & S. 492; *Steevens Hospital v. Dyas*, 15 Ir. Ch. 420.

(h) *Simpson v. Chapman*, 45 Tex. 566.

(l) *Marshall v. Queensborough*, 1 S. & S. 523.

(m) *Mix v. Baldue*, 78 Ill. 217.

(n) *Williamson v. Paxton*, 18 Gratt. 491.

general principle has been applied under other statutes than that of Frauds. As to a case arising under a law by which recovery on an oral contract is limited to three years from the time of the contract,(o) and so the United States must pay for goods actually taken and used, though the contract for them was not in writing, as required by the act of March 2d, 1861,(p) and, following the analogy of the doctrine of part performance, validating oral contracts within the Statute of Frauds, specific performance was decreed of a bond to convey land invalid because not separately acknowledged by a married woman, on the ground that the complainants had taken possession and made improvements.(q)

And though a rule of court required an agreement between counsel to be in writing, yet the doctrine of part performance applied where the parties had altered their situation and gone to expense upon certain real estate, confiding in a parol agreement between counsel.(r) A sale of land by one who is forbidden by law to alienate may be validated by part performance, as by possession and improvements; such part performance raising up an independent equity.(s) On the other hand it has been held that the rule of part performance under the Statute of Frauds allowing a valid but unprovable contract to be proved does not apply where a statute requires every contract of a certain quasi-municipal corporation to be in writing; and that there the oral contract is void.(t) And so, in Missouri under a special statutory proceeding for the specific execution of agreements against the administrators of vendors, only allowed where the agreements are in writing; all the parties interested should have been joined, and not the special statutory remedy have been pursued.(u)

§ 560. Oral evidence is admissible when there has been part performance and the written evidence is manifestly incomplete.(v) Possession taken and maintained under a memorandum insuffi-

(o) *Hall v. Rowley*, 2 Root, 163.

(p) *Burchiel's Case*, 4 Ct. of Cl. 550; 4 C. P. D. 56.

see, however, *Neuchatel v. Dist. of Columbia*, 17 Ct. of Cl. 389.

(q) *Clayton v. Frazier*, 33 Tex. 100.

(r) *Banks v. American Tract Soc.*, 4 Sandf. Ch. 469.

(s) *Hunt v. Turner*, 9 Tex. 388, citing cases.

(t) *Hunt v. Wimbledon Local Board*,

(u) *Schulter v. Bockwinkle*, 19 Mo. 649.

(v) *Moale v. Buchanan*, 11 G. & J. 314; *Fiske v. McGregory*, 34 N. H. 414; *Nelson v. Carrington*, 4 Munf. 341; *Broughton v. Coffey*, 18 Grattan, 197; *Overstreet v. Rice*, 4 Bush, 3;

Part performance in case of an incomplete memorandum.

ciently describing the land may show what the latter really was,^(w) and sometimes even in the case of a defective conveyance^(x) an oral contract of service fulfilled for a length of time in consideration of a devise of land will support the devise, though the will made and delivered to the plaintiff, the testator's son, is invalid as such for other reasons.^(y)

Where there was an agreement for a lease signed by the lessee, the plaintiff, but invalid for want of a stamp, and a memorandum of lease was afterwards made by filling up a printed form in lead pencil, and possession was taken under this agreement, Lord Westbury thought that the defects in the writing were atoned for by the part performance.^(z) In a New York case it was held that a parol contract to let a store to the defendant, and by the defendant to employ the plaintiff as clerk and to sell and deliver goods to the latter, constituting one entire contract, may be proved and insisted on notwithstanding that a bill of sale of the goods is afterwards made which contains nothing in relation to the hiring of the store or the agreement to employ the plaintiff as clerk; that such bill of sale will be deemed a part performance of the parol contract, and not a reducing of the whole contract to writing. The suit was for the plaintiff's services as clerk.^(a) Where a vendee under a parol contract evidenced also by a writing defective under the Statute of Frauds takes and keeps possession, specific performance will be decreed; the pleadings admitted that the possession was taken under the contract; and, *semble*, the price was doubtful, but a reference was made to a master to ascertain, *inter alia*, what was that agreed on.^(b)

An oral sale of land may be validated by part performance (part payment in this instance), though there was a prior un-

Lowry v. Mehaffy, 10 Watts, 387; Fowler v. Redican, 52 Ill. 405; Annan v. Merritt, 13 Conn. 479; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 280; Haven v. Daly, 41 N. Y. Super. 351; Sutherland v. Briggs, 1 Hare, Ch. 31; 11 L. J. Ch. 36; Teal v. Auty, 2 B. & Bingh. 99; 4 Moore, 546; Bourdillon v. Collins, 24 L. T. N. S. Rep. 345; Patterson v. Buffalo, 17 Grant, Ch. 523.

(w) Hanley v. Blackford, 1 Dana, 1.
(x) Purl v. Miles, 9 La. Ann. 270.
(y) Hiatt v. Williams, 72 Mo. 215.
(z) Miller v. Finlay, 5 L. T. Rep. N. S. 510.
(a) Wentworth v. Buhler, 3 E. D. Smith, 305.
(b) O'Neal v. McMahon, 2 Grant, Ch. 146.

stamped memorandum.(c) A memorandum imperfect because not indicating the land sold may be supplemented by acts of part performance which show, as by possession taken or deeds taken, what was actually tendered.(d) The giving of a deed, as has already been seen, does not imply(e) that in it is contained the contract, and the execution thereof and the payment of the purchase-money may be such part performance as to allow oral evidence of the contract under which the deed was given. But it has been held in Massachusetts that possession(f) taken under a deed containing a certain description is not such possession as to give title to other land not described in the deed; and neither the deed nor the possession is any recognition of an alleged oral contract to convey a large tract of which the land described in the deed formed a part.(g)

Where the oral contract can be proved because of the part performance, a subsequent letter written on the subject will not exclude the former mode of proof.(h) The general rule has been applied to the case of personalty, and payment of earnest may be proved by parol, and the contract is thus taken out of the Statute of Frauds, though there is a memorandum which erroneously states it.(i) The fact that a bill of sale of goods is given under an oral sale both of land and goods will not prevent oral evidence being given, if there has been part performance.(j) In a case, however, in the Exchequer in the early part of the last century, "this distinction was laid down upon the Statute of Frauds and Perjuries, that where there is a whole agreement by parol, and part of it is executed, a court of equity will decree a specific execution of the whole, for the Statute of Frauds (says the Chief Baron, Bury) does not extend to that; but where there is an agreement by writing executed, you cannot come by evidence to supply any defect in that agreement, which was intended to be part of that agreement, but

(c) *Sykes v. Bates*, 26 Ia. 521.(g) *Glass v. Hulbert*, 102 Mass. 24.(d) *Armes v. Bigelow*, 3 McArthur, 449.(h) *Haddon v. Haddon*, 42 Ind. 378; and so generally *Ewald v. Lyons*, 29 Cal. 553.

(e) See § 337.

(f) *Trayer v. Reeder*, 45 Ia. 273; see *Crocker v. Higgins*, 7 Conn. 348, where the vendee was held liable to make a certain lease though his deed was silent on the point.(i) *Alexander v. Moore*, 19 Mo. 143.(j) *Rainbolt v. East*, 56 Ind. 538; *Wortley v. Jones*, 11 Gray, 168.

not inserted in it, for that would be to evade the Statute of Frauds and introduce more perjury. The whole court were of the same opinion.”(k)

Where an agreement was averred in chancery to have been a written one, and it was sought to add a term thereto, specific performance was refused, though there were sufficient acts of part performance.(l) In Massachusetts it was said that mere possession—a doctrine which had gone very far—though taken under an alleged parol contract, would not lay ground for the admission of the parol contract to modify a contract in writing between the parties relating to the same subject.(m)

§ 561. That the acts of the party would work a prejudice if the oral contract is not carried out, is ordinarily sufficient part performance.(n) In *Gunter v. Halsey* it was said that there must be material acts of part performance.(o) Where the party performing has altered his situation so as to incur a liability, it is enough; as where one bought land and had the agreement made out in his nephew's name, and which he got the latter to sign, paid part of the purchase-money, and died; it was held that his estate was liable for the rest of the price; as to leave in the lurch the nephew who had thus been involved by his uncle in a liability would be a fraud.(p)

In a Canada case it was said that a change of position which makes a good act of part performance may occur in a negative way. “It is not necessary,” said the court, “that a party should come from a distance, and assume new duties, to bring himself within the principle, though in most instances this has been the case; and where it is so, it is the more readily susceptible of proof. In *Cannan v. Zeran*, which was before the court on rehearing in February last, such change was held to be not necessary. It is a change of position, if a party who is really about to engage in a new pursuit abandons it, and agrees to continue in the occupation in which he

(k) *Binstead v. Coleman*, Bunb. 65. *Davenport v. Mason*, 15 Mass. 92;

(l) *Riddick v. Glennon*, 6 Ir. Jur. *Ricker v. Kelly*, 1 Greenl. 117; *Williams v. Morris*, 95 U. S. 457, citing cases.

(m) *Glass v. Hulbert*, 102 Mass. 24.

(n) *Lester v. Foxcroft*, Colles' Rep. (o) *Supra*.

108; *Lord Pengall v. Ross*, 2 Eq. Cas. (p) *Skidmore v. Bradford*, L. R. 8 Eq. Ab. 46; *Gunter v. Halsey*, Amb. 586; 134, citing cases.

is already engaged, and more emphatically is it so, where he takes upon himself a new duty and responsibility at the instance of the party making the promise, and upon the faith of the promise." The act of part performance in the principal case was that the claimant gave up his intention to emigrate and remained at home and helped in the support of his mother and sister.(g) That a lessee has taken possession under an oral lease for a year, and remained on the land two months paying rent, is a sufficient part performance, as he thereby deprived the lessor of opportunities to let the property.(r) Where A. buys certain land under a promise by B. to discharge the lien of a mortgage thereon, and pays B. more to do so; to recover back the money so paid would not put A. *in statu quo*, and the contract therefore was held to be taken out of the statute.(s) That a mortgagor, relying upon the mortgagee's promise to reconvey to him, has omitted to have a foreclosure sale set aside, is an act of sufficient part performance.(t) An agreement to accept a draft may be sufficient part performance.(u) Where the injury is not made out,(v) or it can be adequately compensated at law, no specific performance will be given.(w) Where a contract not performable within a year was made in Germany, and stipulated for certain services to be rendered in New York, it was held that the fact that the plaintiff came to New York under the contract was not sufficient part performance.(x) And a will made under an agreement to make mutual wills is not part performance, because the will is revocable.(y)

(g) McDonald v. McKinnon, 26 Grant, 13.

(r) Steininger v. Williams, 63 Ga. 476.

(s) Malins v. Brown, 4 Comst. 407.

(t) Morrill v. Cooper, 65 Barb. 516.

(u) Saulsbury v. Blandy, 53 Ga. 667.

(v) Wolfe v. Frost, 4 Sandf. Ch. 90.

(w) Frame v. Dawson, 14 Ves. 387; Overmyer v. Koerner, 2 W. N. Cas. 7 (S. C. Pa.)

(x) Turnow v. Hochstadter, 7 Hun, 80.

(y) Gould v. Mansfield, 103 Mass. 409.

CHAPTER XXV.

PART PERFORMANCE—GENERAL RULES.

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| <p>§ 562. Part performance must be with assent of parties to be charged.</p> <p>§ 563. Part performance notorious, continuous, and exclusive.</p> <p>§ 564. Part performance by a negative act; part performance must not be unlawful; how far part performance is question for the court or jury.</p> <p>§ 565. Part performance must refer exclusively to contract, and be such as would not have been done but for the latter.</p> <p>§ 566. There must be a concluded contract.</p> <p>§ 567. Part performance must be under the very contract and not under another.</p> | <p>§ 568. Part performance must follow, not precede the contract; acts of mere preparation.</p> <p>§ 569. What is sufficient under the last rule; how far declaration of intention necessary.</p> <p>§ 570. Examples of part performance insufficient.</p> <p>§ 571. Examples sufficient and insufficient. The rule where the contract set up is the only one to which the part performance can be referred, &c.</p> <p>§ 572. Part performance before the contract, insufficient (further considered).</p> <p>§ 573. When the part performance too late; what the evidence must be, &c:</p> |
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§ 562. THE part performance, to be sufficient, must be with the knowledge of the person sought to be charged, and with his assent, either express or implied. (a) Possession taken by the vendee of land must, to be part performance, be taken with the known permission of the ven-

(a) *Williams v. Morris*, 95 U. S. S. C. 456-7; *Brock v. Cook*, 3 Porter (Ala.), 464; *Danforth v. Laney*, 28 Ala. 278; *McNeill v. Jones*, 21 Ark. 277; *Houston v. Townsend*, 1 Del. Ch. 422; *Ash v. Daggy*, 6 Porter (Ind.), 259; *Johnston v. Glancy*, 4 Blackf. 99; *Moore v. Higbee*, 44 Ind. 488; *Neal v. Neal*, 69 Ind. 422; *Carrolls v. Cox*, 15 Iowa, 455; *Thornbury v. Bromfield*, 24 Iowa, 92; *Shreve v. Grimes*, 4 Litt. 223; *Young v. Pate*, 3 J. J. Marsh, 101; *Clary v. Marshall*, 5 B. Mon. 269; *Piffner v. Still-*

water R. R. Co., 23 Minn. 344; *Leslie v. Smith*, 32 Mich. 67; *Seager v. Burns*, 4 Minn. 147; *Gill v. Newell*, 13 Minn. 468; *Bean v. Valle*, 2 Mo. 103; *Charpiot v. Sigerson*, 25 Mo. 63; *Evans v. Lee*, 12 Nev. 399; *Smith v. Smith*, 4 Dutch. 217; *Camden &c. R. R. v. Stewart*, 18 N. J. Eq. 492; *Jervis v. Smith*, Hoff. Ch. 470; *Smith v. Underdunk*, 1 Sandf. Ch. 106; *Hawley v. Keeler*, 53 N. Y. 114; *Pulse v. Hamer*, 8 Or. 254; *McClure v. McClure*, 1 Pa. St. 374; *McLain v. School Directors*, 51 Pa. St.

dor.(b) Assent is enough.(c) Possession must be with the leave of the owner of the land ; mere acquiescence, unless the owner lives in the neighborhood, is not enough.(d) Mere acquiescence will have no effect if there was no contract, and the possession of the land was given merely under a license.(e)

In a California case not affected by the Statute of Frauds, the court, laying down the broad principle, said : " It is not the making of improvements, or expending of money on another's property, which entitles the person so expending to hold the property, or even the improvements ; but it is the fraud of the owner, who, silently or otherwise, encourages the expenditure. But this fraud only exists at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief that he is the owner of the property."(f) Where possession of land was delivered under an agreement, parol evidence was admitted to show the latter ; and this being proved, the Lord Chancellor said that he would presume that the vendor was cognizant of improvements made by the vendee.(g) Where the vendor gives title-papers, the possession taken will be assumed to have been with his assent.(h) Where the person partly performed with the knowledge of one who had an adverse title unknown to the former, the part performance is sufficient.(i) Where a husband, verbally authorized by his wife, sold, also verbally, her land and put the purchaser in possession, who made improvements and made a payment which enured to the wife, it was held that the vendee took a good equitable title.(j)

Where there were possession and improvements under a parol sale of land with the assent of the vendor, the latter is bound, though afterwards a dispute arose as to what price was due, the vendor, de-

196 ; Goucher v. Martin, 9 Watts, 109 ; Thomson v. Scott, 1 McCord, Ch. 38 ; Givens v. Calder, 2 Desaus. Ch. 171 ;

Curlin v. Hendricks, 35 Tex. 244 ; Robinson v. Davenport, 40 Tex. 341 ; Ponce v. McWhorter, 50 Tex. 571 ; Whitcher v. Morey, 39 Vt. 459.

(b) Lord v. Underdunck, 1 Sandf. Ch. 48, citing cases.

(c) Dugan v. Colville, 8 Tex. 126 ; Gregory v. Mighell, 18 Ves. 333 (there

was no express assent, but an acquiescence during a series of years).

(d) Bean v. Valle, 2 Mo. 111.

(e) Ellsworth v. Hale, 33 Ark. 636.

(f) McGarrity v. Byington, 12 Cal. 431.

(g) Toole v. Medlicott, 1 Ball & B. 404.

(h) Tohler v. Folsom, 1 Cal. 210.

(i) Town v. Needham, 3 Paige, Ch. 553.

(j) Bayer v. Cockerill, 3 Kan. 293. See Huff v. Price, 50 Mo. 230.

fendant, warned the vendees, plaintiffs, not to go on with improvements. The vendor never disavowed the verbal contract, but only disputed as to payments; and payments were accepted after they were due, and so an objection that they were too late could not be made; under such circumstances the vendor is estopped to set up the Statute of Frauds.(k) Where the contract was made by an agent and the other party has partly performed, the latter can show that the principal was cognizant of the transaction or was party to the contract.(l) But where an agent in making a sale of land was directed to sell by a certain written form, delivery by him of possession will not be good part performance to bind the principal.(m) Where a father, having made an oral gift of land to his son, introduced the latter as owner of the land to the insurers who made out the policy in the son's name, it is enough.(n)

Acts of part performance permitted by the husband will not bind a wife.(o) Possession taken wrongly or without the assent of the vendor has no effect as part performance.(p) Where an owner of land delivering possession expressly reserves all the title to himself, there is no sufficient part performance.(q) A wife in her husband's lifetime was party to an invalid oral contract to convey the homestead; and it was claimed that the wife, by receiving the benefits of the contract after the husband's death, ratified and confirmed it, or rather that she was in the position of a sole owner, having made a contract for the sale of the homestead in parol, which the statute does not prohibit. But it was held not to be sufficient part performance under the circumstances, as the wife was very ill, and was anxious though unable to move.(r)

Part payment made to an agent not authorized to contract, and possession taken without the owner's permission, are insufficient part performance.(s) Where the party sought to be charged

(k) *Potter v. Jacobs*, 111 Mass. 36.

(l) *Butler v. Kaulback*, 8 Kan. 675; *Rutherford v. Sargent*, 71 Ill. 342; but see *acus* where the part performance was after the principal had disavowed the agent's contract; *Poland v. O'Connor*, 1 Neb. 50.

(m) *Baring v. Peirce*, 5 W. & S. 550.

(n) *Hardesty v. Richardson*, 44 Md. 621.

(o) *Church v. Farrow*, 7 Rich. Eq.

384; though the husband might be bound, *Hedrick v. Hern*, 4 W. Va. 625; *Huff v. Price*, 50 Mo. 230.

(p) *Charpiot v. Sigerson*, 25 Mo. 64; *Durham v. Roberts*, 33 Ga. Supp. 123.

(q) *McKay v. McKay*, 15 Grant, Ch. 373.

(r) *Clark v. Evarts*, 46 Ia. 250.

(s) *Bosseau v. O'Brien*, 4 Biss. 402; see *Poland v. O'Connor*, 1 Neb. 50.

did not know of the alleged contract which was claimed to have been partly performed, he is not bound.(t) The part performance must be during the life of the person sought to be charged.(u) Expenditures made on the faith of the contract are good so far as incurred before the death of the other party.(v) Possession, to be part performance, must be delivered and acquiesced in, and not a mere scrambling possession.(w) So where assent to the possession taken is refused, and nothing more than bare sufferance shown, it is insufficient.(x)

Improvements by a tenant from year to year who had asked for but been refused a term, are not part performance.(y) Part performance done with the knowledge that the other party has disavowed the contract is insufficient.(z) Where there is part performance both by possession taken and improvements made, the fact that the former was unauthorized will not detract from the effect of the latter.(a) Possession taken while the land is out on lease is insufficient against the lessor.(b) A parol agreement for a lease made by a life tenant with power to let will not, on the ground of part performance, be upheld against the remainderman.(c)

Possession taken by a railroad under its charter is not delivered by the owner of the land, and is therefore not part performance.(d) A verbal sale within the Statute of Frauds is not ratified by an assignment by the vendor of an account against the vendee therefor, because to constitute part performance the vendor and vendee must concur in the act done.(e) Acts done as to third parties are

(t) *O'Fay v. Burke*, 8 Ir. Ch. R. 225.

(u) *Kelly v. Sweeter*, 17 Grant Ch. 375; *Sage v. McGuire*, 4 W. & S. 228; a case under an act (February 24th, 1834, § 15 and 16) allowing the specific enforcement of contracts of a decedent partly performed in his lifetime.

(v) *Towlerton v. Davidson*, 7 Minn. 411; *Ray v. Town*, 13 Tex. 550; *Howe v. Rogers*, 32 Tex. 221.

(w) *Purcell v. Miner*, 4 Wallace, 517; see *Charpiot v. Sigerson*, 25 Mo. 64.

(x) *Jervis v. Smith*, 1 Hoff. Ch. 472.

(y) *West v. Flannagan*, 4 Md. 56.

(z) *Wood v. Thornley*, 58 Ill. 463.

(a) *Shillibeer v. Jarvis*, 8 DeG. M. & G. 81.

(b) *Stone v. Crocker*, 19 Pick. 291; *Osborn v. Phelps*, 19 Conn. 74; *West v. Flannagan*, 4 Md. 56; see *Towlerton v. Davidson*, 7 Minn. 411.

(c) *Trotman v. Flesher*, 3 Giff. 9; see *O'Fay v. Burke*, 8 Ir. Ch. R. 225; *Blore v. Sutton*, 3 Meriv. 245.

(d) *Haisten v. Savannah R. R.*, 51 Ga. 200; and even where it is doubtful whether the part performance is under the charter or under the contract; *Jacobs v. Peterborough R. R.*, 8 Cush. 224.

(e) *Hicks v. Cleveland*, 48 N. Y. 84.

not sufficient part performance.(f) Where a complainant built his house back from the street on a line with that of the defendant's under an agreement that the latter would never build forward, it is a questionable act of part performance, as the complainant was dealing with his own property, and it was not with and did not require the consent of the defendant.(g)

§ 563. Acts of part performance must be notorious, continuous, and exclusive in their character.(h) The part performance must be notorious. "The great leading principle by which courts are governed is that there must be some act of performance done that is palpable and evident to the senses of all. An act that can be relied on as certain, about which there can be no misunderstanding, and which does not rest solely in the recollection, understanding, or belief of witnesses; such as absolute and visible possession of the premises, the actual building of houses, or the making of other lasting improvements."(i)

Possession taken must be of a notorious character; fictitious possession, which the law imputes to the legal owner when there is no actual adverse possession, is sufficient.(j)

The part performance must be continuous; abandonment of

(f) *North v. Forest*, 15 Conn. 404; *Smith v. McVeigh*, 3 Stockt. 240.

(g) *Supra*.

(h) *Purcell v. Miner*, 4 Wallace, 517; *Hawkins v. Hudson*, 45 Ala. 494; *Ellsworth v. Hale*, 33 Ark. 636; *Hoffman v. Fett*, 39 Cal. 109; *Annan v. Merritt*, 13 Conn. 79; *Church v. Sterling*, 16 Conn. 402; *Green v. Finin*, 35 Conn. 178, citing *Eaton v. Whitaker*; *Mims v. Lockett*, 33 Ga. 9; *Stevens v. Wheeler*, 25 Ill. 300; *Blunt v. Tomlin*, 27 Ill. 93; *Mason v. Bair*, 33 Ill. 207; *Holmes v. Holmes*, 44 Ill. 168; *Kurtz v. Hibner*, 55 Ill. 521; *Moreland v. Lemasters*, 4 Blackf. 383; *Atkinson v. Jackson*, 8 Ind. 33; *Stater v. Hill*, 10 Ind. 173; *Ford v. Ellingwood*, 3 Metc. (Ky.) 363; *Edwards v. Fry*, 9 Kan. 422; *Johnson v. McGruder*, 15 Mo. 365; *Despain v. Carter*, 21 Mo. 331; *Lee v. Howe*, 27 Mo.

521; *Newton v. Swazey*, 8 N. H. 13; *Tilton v. Tilton*, 9 N. H. 385; *Coster v. Tide Water Co.*, 3 Green, Ch. (N. J.) 59; *Finucare v. Kearney*, 1 Freem. Ch. 65; *Cummins v. Nutt*, Wright (Ohio), 713; *Sites v. Keller*, 6 Hamm. 483; *Frye v. Shepler*, 7 Pa. St. 91; *Peckham v. Barker*, 8 R. I. 17; *Lyles v. Lyles*, Harper, 288, 290; *Ottenhouse v. Burleson*, 11 Tex. 87; *Neatherly v. Ripley*, 21 Tex. 434; *Howe v. Rogers*, 32 Tex. 218; *Wood v. Jones*, 35 Tex. 64; *Johnson v. Bowden*, 37 Tex. 621; *Gasden v. Tucker*, 6 Munf. 1; *Parrill v. McKinley*, 9 Gratt. 1; *School District v. Macloone*, 4 Wis. 79.

(i) *Johnston v. Glancy*, 4 Blackf. 94; see *Brown v. Lord*, 7 Or. 309.

(j) *Charpiot v. Sigerson*, 25 Missouri, 64.

possession destroys the right to specific performance if there is a writing, and a *fortiori* where there is none.(k)

Possession surrendered by the vendee to the vendor before the suit, is insufficient part performance.(l) So temporary possession as a guest.(m) So part performance during a few months of a contract extending by its terms over a long period.(n) But a family arrangement compromising a doubtful right in land, acted upon by possession and improvements for nineteen years, was sustained in another instance.(o) Where there is no other performance besides certain payments of money, except a joint possession by the donee or vendee with his father, who was sought to be charged by the former under the parol agreement, it is insufficient.(p) So where a wife claimed under an oral contract of sale of land from her husband, and the only part performance was the payment of money and possession by the wife jointly with her husband.(q)

Where, under a parol agreement, to reconvey a life estate to him, a husband conveys land to his wife, and remains in possession, it seems that he has, through part performance, an equitable right to specific performance.(r) That the person partly performing has had the profits of the land, will not alone make the part performance insufficient.(s) But evidence to show that such profits have been a compensation for the part performance, is admissible.(t) And part performance which is readily to be compensated for by money is insufficient.(u) It has even been suggested that it is for the plaintiff to show affirmatively that his acts of part performance have not been compensated to him.(v) So in the case of a gift.(w)

Clearing timber which was repaid by the sale of the wood is not sufficient part performance.(x) Where the expenditure is exceeded

(k) *Meriwether v. Meriwether*, 3 Litt. 418.

(l) *Haight v. Child*, 34 Barb. 186.

(m) *Davis v. Moore*, 9 Rich. 215.

(n) *Greenlee v. Greenlee*, 22 Pa. St. 235.

(o) *Stockley v. Stockley*, 1 V. & B. 23.

(p) *Cronk v. Trumble*, 66 Ill. 432.

(q) *Cuppy v. Hixon*, 29 Ind. 522; see *Hixon v. Cuppy*, 33 Ind. 211.

(r) *Redfield v. Holland & Co. Insurance Co.*, 56 N. Y. 357, citing cases.

(s) *Young v. Glendenning*, 6 Watts, 509.

(t) *Meriwether v. Meriwether*, 3 Litt. 418; but see *Mims v. Lockett*, 33 Ga. 9.

(u) *Wible v. Wible*, 1 Grant (Pa.), 406; see *Cox v. Cox*, 26 Gratt. 311; *Tufts v. Tufts*, 3 W. & Minot, 476.

(v) *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346.

(w) *Caldwell v. Williams*, 1 Bailey's Ch. 175.

(x) *Ash v. Daggy*, 6 Porter (Ind.), 259.

by the benefit, all the greater is the reason for refusing specific performance.(y)

§ 564. Where B. had in writing agreed to buy land of A., and both agreed that A. should search for coal, and if coal was found B. was to pay more; the fact that A. gave over searching for the coal was insufficient part performance of a parol agreement that if ever coal was found B. was to pay an advance price; because the suspension of the search(z) could be accounted for in other ways than as part performance of the oral contract. Mere forbearance to assert a lien and continuing to work for the person answered for, though on the faith of the guaranty, is insufficient.(a) But desisting from the redemption of lands sold for taxes, and payment to the tax-owner of part of the price, is sufficient part performance of a contract by the tax-owner to sell to the original owner.(b)

That a mortgagor relies on the defendant's promise to reconvey, and omits to have a foreclosure sale set aside, is an act of sufficient part performance.(c) But it has been held that where the plaintiff was induced to consent to a partition by the promise of a co-devisee that the latter will hold part of her own share in trust for the plaintiff, and withdrew all opposition, the part performance was not sufficient.(d) It seems that the acts of the defendant's house-keeper in not claiming wages due, in remaining with the defendant, and giving up an opportunity of marrying, are sufficient part performance of a contract to devise to the person so partly performing, certain land; but the connection of these acts with the contract was not sufficiently made out in the particular case.(e)

As we have already seen, the abandonment of an intention to emigrate, and a continuance at home in order to support a mother and sister, may be sufficient part performance of the promise of a brother to give the claimant part of his land.(f) Acts of part

- (y) *Wack v. Sorber*, 2 Wharton, 387. D. 174; 50 L. J. Q. B. 466; 29 W. R. 556 (before the Lords Justices, reversing the Exchequer Division as reported in 5 Exch. D. 294; 43 L. T. N. S. 349).
 (z) *Heth v. Woolridge*, 6 Rand. 605.
 (a) *Brightman v. Hicks*, 108 Mass. 246.
 (b) *Daniels v. Lewis*, 16 Wis. 140.
 (c) *Morrill v. Cooper*, 65 Barb. 516.
 (d) *Morley v. Davison*, 20 Gr. Ch. 101.
 (e) *Alderson v. Maddison*, 7 Q. B. 174; 50 L. J. Q. B. 466; 29 W. R. 556 (before the Lords Justices, reversing the Exchequer Division as reported in 5 Exch. D. 294; 43 L. T. N. S. 349).
 (f) *McDonald v. McKinnon*, 26 Grant, Ch. 13.

performance must not be unlawful in character.(g) What acts of part performance are sufficient is a question of law for the court,(h) and binding instructions should be given the jury; but(i) the court, with a caution, should leave to the jury the question of the facts which are claimed to make out the part performance.

§ 565. Acts of part performance must exclusively refer to the contract, and be such as would not have been done but for the latter.(j) To make acts of part performance effective to take an oral agreement out of the Statute of

Part performance must refer exclusively to contract, and be such

(g) *Keatts v. Rector*, 1 Ark. 411.

(h) *O'Reilly v. Thompson*, 2 Cox, Ch. 271; *Burdon v. Backus*, 4 DeG. F. & J. 47; *Overmeyer v. Koerner*, 2 W. N. C. 6 (S. C. Pa.)

(i) *Irwin v. Irwin*, 34 Pa. St. 529.

(j) See the cases cited *supra*, and the following:—*Frame v. Dawson*, 14 Ves. 387; *Kine v. Balfé*, 2 Ball & B. 343; *Morphett v. Jones*, 1 Swanst. 181; *Hood v. Bowman*, 1 Freem. Ch. 292; *Palmer v. White*, *Wallis (Lyne)*, 22; *Williams v. Morris*, 95 U. S. S. C. 457; *Purcell v. Miner*, 4 Wall. 517; (*Ex parte*) *Storer*, *Daveis*, 297; *Walsh v. Rundlette*, 2 *McArthur*, 120; *Brock v. Cook*, 3 *Porter (Ala.)*, 464; *Cummings v. Gill*, 6 Ala. 562; *Danforth v. Laney*, 28 Ala. 278; *Chambliss v. Smith*, 30 Ala. 369; *Arrington v. Porter*, 47 Ala. 721; *Keatts v. Rector*, 1 Ark. 411; *Blakeney v. Ferguson*, 3 Eng. 277; *McNeill v. Jones*, 21 Ark. 277; *Morrison v. Peay*, 21 Ark. 118; *Ellsworth v. Hale*, 33 Ark. 636; *Crocker v. Higgins*, 7 Conn. 348; *Carlisle v. Fleming*, 1 *Harring*, 431; *Houston v. Townsend*, 1 Del. Ch. 422; *Black v. Black*, 15 Ga. 445; *Durham v. Roberts*, 33 Ga. Supp. 123; *Graham v. Theis*, 47 Ga. 483; *Rawlins v. Shropshire*, 45 Ga. 188; *Simonton v. Liverpool*, London and Globe Ins. Co., 51 Ga. 80; *Wood v. Thornley*, 58 Ill. 466; *Laird v. Allen*, 82 Ill. 43; *North v. North*, 9 *Chic. Leg. News*, 396; *Johnston v. Glancy*, 4 *Blackf.* 94; *McDowell v. Lucas*, 97 Ill.

493; *Sands v. Thompson*, 43 Ind. 21; *Moore v. Higbee*, 45 Ind. 488; *Neal v. Neal*, 69 Ind. 422; *Williamson v. Williamson*, 4 Ia. (Clarke) 282; *Fairbrother v. Shaw*, Id. 571; *Baldwin v. Thompson*, 15 Ia. 504; *Mahana v. Blunt*, 20 Ia. 143; *Sweeney v. O'Hara*, 43 Ia. 36; *Ricker v. Kelly*, 1 Greenl. 117; *Chesapeake and Ohio Canal Co. v. Young*, 3 Md. 490; *Mundorff v. Kilbourn & Howard*, 4 Md. 459; *Stoddert v. Bowie*, 5 Md. 33; *Shepherd v. Bevin*, 9 Gill, 32; *Owings v. Baldwin*, 1 Md. Ch. 122; *Shepherd v. Shepherd*, 1 Md. Ch. Dec. 244; *Beard v. Linthicum*, 1 Md. Ch. Dec. 345; *Duval v. Myers*, 2 Md. Ch. 401; *Haines v. Haines*, 6 Md. 435; *Rosenthal v. Freeburger*, 26 Md. 75; *McNamee v. Withers*, 37 Md. 177; *Billingslea v. Ward*, 33 Md. 48; *Semmes v. Worthington*, 38 Md. 298; *Hardesty v. Richardson*, 44 Md. 621; *Hopkins v. Roberts*, 54 Md. 316; *Davenport v. Mason*, 15 Mass. 92; *Glass v. Hulbert*, 102 Mass. 24; *Wentworth v. Wentworth*, 2 Minn. 283; *Gill v. Newell*, 13 Minn. 468; *Charpiot v. Sigerson*, 25 Mo. 63; *Young v. Montgomery*, 28 Mo. 604; *Price v. Hart*, 29 Mo. 171; *Evans v. Lee*, 12 Nev. 399; *Tilton v. Tilton*, 9 N. H. 389; *Ayer v. Hawks*, 11 N. H. 152; *Ham v. Goodrich*, 33 N. H. 36; *Kidder v. Barr*, 35 N. H. 253; *Buntton v. Smith*, 40 N. H. 352; *Wallace v. Brown*, 2 Stockt. 308; *Campbell v. Campbell*, 3 Stockt. 278; *Eyre v. Eyre*,

as would not have been done but for the latter. Frauds, the acts must be such as cannot be explained consistently with any other agreement than the one alleged.^(k) It has been said that "the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved."^(l) Where an arrangement does not amount to a contract it is not to be specifically enforced because partly performed.^(m)

In order to constitute a good title by parol the possession must be contemporaneous with or immediately consequent upon the contract and in pursuance of it, and these facts must be established by clear evidence.⁽ⁿ⁾ In a Maryland case of an alleged parol gift of land from a father to his son, the court said: "It is true, it is neither alleged nor proved that it was any part of the agreement or understanding that the farm was to be improved by the son, as

4 C. E. Green, Ch. 102; Green v. Richards, 8 C. E. Green, 33; Wetmore v. White, 2 Caines' Cases, 109; Niven v. Belknap, 2 Johns. 587; Phillips v. Thompson, 1 Johns. Ch. 131; Jervis v. Smith, 1 Hoff. Ch. 472; Massey v. McIlwain, 2 Hill's Ch. 426; Wolfe v. Frost, 4 Sandf. Ch. 90; Lowry v. Tew, 3 Barb. Ch. 407; Rathbun v. Rathbun, 6 Barb. 105; Richmond v. Foote, 3 Lans. 249; Williston v. Williston, 41 Barb. 635; Morrill v. Cooper, 65 Barb. 516; Lobdell v. Lobdell, 36 N.Y. 327; Freeman v. Freeman, 43 N. Y. 34; Armstrong v. Kattenhorn, 11 Ohio, 271; Brown v. Lord, 7 Oregon, 309; Syler v. Eckart, 1 Binn. 380; Bassler v. Niesly, 2 S. & R. 352; Jones v. Peterman, 3 S. & R. 547, 548; Peifer v. Landis, 1 Watts, 393; Martin v. McCord, 5 Watts, 494; Haslet v. Haslet, 6 Watts, 464; Young v. Glendenning, 6 Watts, 509; Robertson v. Robertson, 9 Watts, 36; Goucher v. Martin, 9 Watts, 106; Sage v. McGuire, 4 W. & S. 228; Pattison v. Horn, 1 Grant (Pa.), 301; Wible v. Wible, Id. 406; Farley v. Stokes, 1 Pars. Eq. Rep. 422; Eckert v. Eckert, 3 P. & W. 332; Eckert v. Macu, 3 P. & W. 364; Aurand v. Wilt, 9 Pa. St. 54;

Cravener v. Bowser, 4 id. 262; Aitkin v. Young, 12 id. 15; Hugus v. Walker, 12 id. 173; Christy v. Barnhart, 14 id. 261; Moore v. Small, 19 id. 461; Rankin v. Simpson, 19 id. 477; Blakeslee v. Blakeslee, 22 id. 237; Dugan v. Blocher, 24 id. 28; Lauer v. Lee, 42 id. 170; McLain v. School Directors, 51 id. 196; McGibbeny v. Burmaster, 53 id. 332; Milliken v. Dravo, 67 id. 230; Bush v. National Oil Refining Company, 1 W. N. C. 297; Overmeyer v. Koerner, 2 W. N. C. 6; Shellhammer v. Ashbaugh, 83 Pa. St. 28; Gordonier v. Billings, 77 id. 198; Caldwell v. Williams, 1 Bailey, Ch. 175; Anderson v. Chick, Id. 118; Smith v. Smith, 1 Rich. Eq. 134; Church of the Advent v. Farrow, 7 Rich. Eq. 382; Goodhue v. Barnwell, Rice, Eq. 198; Dugan v. Colville, 8 Tex. 126; Payne v. Graves, 5 Leigh, 565; Wright v. Pucket, 22 Gratt. 374; Pierce v. Catron, 23 Gratt. 597; Lester v. Lester, 28 Grattan, 737; Knoll v. Harvey, 19 Wis. 99.

(k) Sitton v. Shipp, 65 Mo. 298.

(l) McIneres v. Hogan, 61 How. Pr. 447.

(m) Orr v. Orr, 21 Grant, Ch. 413.

(n) Aitkin v. Young, 12 Pa. St. 24.

a condition upon which he was to receive a conveyance of the title from his father, but it is alleged and abundantly proved that large expenditures were made in permanent improvements upon the land, with the knowledge of the father, and which were induced by and made upon the faith and in consideration of the father's promise to convey the land. This constitutes a good equitable consideration, which courts of equity will protect and enforce. In such cases the court relies not so much on the contract, which falls within the Statute of Frauds, as on the acts done under it subsequently, on the faith that the promise will be performed by the other party."(*o*)

In a Canada case it was said that the part performance need not have been a term of the contract; it is enough that the former is a consequence of the latter.(*p*) Where the acts of part performance are not carried out according to the agreement, they are insufficient.(*q*) The burden of proof is upon the plaintiff setting up an oral title to show the contract under which possession was taken.(*r*) There must be a contract express or implied; and it has been said that the contract must be express.(*s*)

Mere using and improving land will not alone create an equitable title; there must be some claim to the land, not less than an adverse holding; (the claimants were in by leave of their father).(t) Mere possession, without a definite promise to sell or give land, will not support as part performance acts done by the claimant whereby in expectation of obtaining the land he has incurred loss.(u)

§ 566. There must be a concluded contract.(v) Where one, in the absence of any contract even implied, and knowing that he had no right either of property or contract, chooses to improve the land of another in the hopes of getting either a lease or compensation, he is entitled to neither.(w) Part performance by one who declares that he has only

There must be a concluded contract.

(*o*) *Hardesty v. Richardson*, 44 Md. 624.

(*p*) *Jennings v. Robertson*, 3 Gr. Ch. 517.

(*q*) *Cooth v. Jackson*, 6 Ves. Jr. 16.

(*r*) *Danforth v. Laney*, 28 Ala. 278.

(*s*) *Greenlee v. Greenlee*, 22 Pa. St. 235; *Tufts v. Tufts*, 3 W. & Minot, 476.

(*t*) *Ellsworth v. Hale*, 33 Ark. 636.

(*u*) *Shropshire v. Brown*, 45 Ga. 179.

(*v*) *Thynne v. Lord Glengall*, 2 C. & Fin. N. S. 157; 2 H. L. C. 94; *Bertel v. Neveux*, 39 L. T. N. S. 259.

(*w*) *Ramsden v. Dyson*, L. R. 1 H. L. 165; see Lord Kingsdown's dissent.

the use of the land is not sufficient.(x) Letting land as the agent of the vendor, though accompanied by a declaration of ownership, is insufficient part performance.(y) There is no part performance in the case of a purchase at sheriff's sale, as the vendee does not take under a contract with the late owner, even though, *semble*, the vendee obtained the property by agreeing with the owner to allow the latter to redeem.(z) Courts of equity will, however, take the pains of ascertaining the contract when part performance has been shown.(a)

In a recent case Cotton, L. J., said that the possession of land implied a contract which the court will proceed to ascertain.(b) In a case before Wigram, V. C., where the plaintiff, tenant of a house under a long lease, and tenant from year to year of an adjacent meadow, agreed orally with the defendant, who was owner of the house, and who became owner of the meadow, for a lease of the latter similar to that of the house; and, acting under the agreement, proceeded to extend his house upon the meadow. The Vice-Chancellor held that the part performance was sufficient to entitle the plaintiff to a lease of the whole meadow; and said: "Undoubtedly it is in general necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered."(c)

(x) Rankin v. Simpson, 19 Pa. St. 471.

(y) Anderson v. Chick, Bailey's Eq. Rep. 118.

(z) Merritt v. Brown, 4 C. E. Green, 289.

(a) Wilson v. West Hartlepool R. R., 2 DeG. J. & S. 492.

(b) Brittain v. Rossiter, 27 W. R. 482; 48 J. Exch. 362; 40 L. T. N. S. 240.

(c) Sutherland v. Briggs, 1 Hare, Ch. 31; 11 L. J. Ch. 36.

An extreme instance of the zeal of a

chancellor in searching for the contract is to be found in Allan v. Bower, a case sharply criticized by Lord Redesdale in Clinan v. Cooke. The facts were that one Bower, whom the defendant represented, left a memorandum in which he stated that as the plaintiff and another having been at great expense in their farms, he did not wish them disturbed in their possession, though he did not wish to give them leases, as it would be impossible for them to pay rent; and the Lord Chancellor Thurlow said: "The

The plaintiff paid the defendant for land, but the title being imperfect, she reconveyed it and sued for the money paid; the defendant alleged an oral contract to take part of the repayment in land owned by A., but which the defendant would procure to be conveyed to the plaintiff. The contract was within the Statute of Frauds, and the defendant having, with a view to this arrangement, paid the cash as part of the repayment to the plaintiff, and discharged a mortgage he held on the land of A., neither act was part performance—the first the defendant was obliged to do apart from the contract, and the second was not under the contract or at the plaintiff's desire; it was merely preparatory.(d)

§ 567. The part performance must be under the very contract sought to be enforced, and not a different one.(e) Where one contract is sued upon and the part performance is of another, it is insufficient.(f)

Part performance must be under the very contract and not under another.

Where possession is taken under a contract and the latter is changed, it is an open question how far the part performance can sustain the modified contract; in the case where the point arose *Romilly, M. R.*, took the negative side, and was sustained on appeal by *Knight-Bruce, L. J.* *Turner, L. J.*, was of the opposite opinion, and the House of Lords affirmed the judgments below on the ground that the contract was not proved.(g) The part performance must be referable solely to the contract in

paper, signed by Robert Bower, clearly purported that he was under an engagement to grant the plaintiff an interest of some kind in the estate. The rule by which the master must proceed in the inquiry, he said, was very plain, for the plaintiff would be entitled to such a term of years as was of the value of the money which he had laid out in improvements upon the farm; but at the same time he (the Chancellor) said as it was possible that the term which the plaintiff was originally entitled to might by this time have expired, it being eleven years since the agreement was made, the plaintiff must consent that if the master should find the term to be granted was such as would before now have expired, he would pay the

defendants the increased rent equal to the actual additional value of the farm from the time of making this order;" *Allan v. Bower*, 3 Bro. C. C. 150.

(d) *Colgrove v. Solomon*, 34 Mich. 499.

(e) *Savage v. Carroll*, 1 Ball & B. 281; *Kidder v. Barr*, 35 N. H. 253; *Gotschalck v. Witter*, 25 Ohio St. 80; *Sanborn v. Sanborn*, 7 Gray, 146.

(f) *Kemper v. Ewing*, 25 Gratt. 431; *Wilson v. Wilson*, 6 Mich. 13. And in *Toole v. Medlicott*, 1 Ball & B. 404, *Lindsay v. Lynch*, 2 Sch. & Lef. 1, was said to go on this ground.

(g) *Price v. Salusbury*, 32 Beav. 459; on appeal before *LJJ.*, 32 L. J. Ch. 448; in *Dom. Proc.* 14 L. T. N. S. 111.

suit.(h) The mere fact that the two parties set up different versions of the contract does not deprive the one partly-performing of the benefit of such performance.(i) Possession under a contract to rent is not performance under a contract to buy.(j) Where, in partly performing, reliance is had upon other sources of compensation than the oral contract, it is insufficient.(k) Where the parties to a suit give each a different version of the contract, and the evidence does not prove but that the part performance may as well have been under the one as under the other, the Statute of Frauds is not satisfied.(l)

Where the contract is with a different person the rule is the same; a parol gift of land, therefore, from a father to his married daughter followed by possession, &c., by the latter's husband, gives the husband no title beyond his curtesy;(m) it seems that a conveyance of land to the promisor is not sufficient part performance of a contract to support the promisee during life, because the conveyance may have been in consideration of past maintenance.(n) Where one who afterwards became the petitioner's wife promised him that if he should marry her, and would take possession of and improve certain land, she would convey it to him, it was held that possession taken and improvements made by the petitioner were insufficient, because made in his character as husband and not as vendee.(o)

§ 568. The part performance must follow not precede the contract.(p) Acts ancillary or preparatory, and such as are not intended to be directly a substantial part performance of the agreement, are insufficient.(q) Exploring the land, having the land surveyed and

Part performance must follow not precede the contract;

(h) *Savage v. Carroll*, 1 Ball & B. 281; *Semmes v. Worthington*, 38 Md. 317; *Brennan v. Bolton*, 2 Dr. & War. 354.

(i) *Sweeney v. O'Hara*, 43 Ia. 36.

(j) *Brown v. Hayes*, 33 Ga. (Supp.) 140 (a case not affected by the Statute of Frauds); and see *Williams v. Morris*, 95 U. S. 456.

(k) *Ellis v. Pacific R. R.*, 51 Mo. 204.

(l) *McIneres v. Hogan*, 61 How. Pr. 447; but see *McFarlan v. Dickson*, 13

Grant, Ch. 277; *secus* where the evidence showed only one contract.

(m) *Ingham v. Crany*, 1 P. & W. 394; see *Nye v. Taggart*, 40 Vt. 299; and *Hedrick v. Hern*, 4 W. Va. 625.

(n) *Slater v. Smith*, 10 U. C. Q. B. 630.

(o) *Henry v. Henry*, 27 Ohio St. 128.

(p) *Pfiffner v. Stillwater R. R.*, 23 Minn. 344; and see the cases above cited.

(q) *Williams v. Morris*, 95 U. S. S. C. 457; *Colgrove v. Solomon*, 34 Mich. 499.

timber valued, or the like, is not sufficient ;(*r*) nor the acts of mere preparation and delivery of the necessary deeds or the preparation. abstract of title.(*s*) It seems that preparing deeds, &c., is insufficient part performance.(*t*)

That the vendee had the conveyance prepared, and went to view the estate, is not sufficient part performance.(*u*) Giving instructions for such preparation is even less efficacious.(*v*) Taking an inventory, being merely experimental, is not part performance.(*w*) Part performance by the plaintiff before the defendant got title is insufficient.(*x*) Where there was an agreement by the defendant, that upon the plaintiff procuring a certain release of right from a stranger, the defendant would convey, it is not sufficient part performance that the plaintiff by giving a valuable consideration procures the release, because this was a condition annexed and necessary to be done by the plaintiff in order that he might call for the execution of the contract.(*y*) A contract, A. having conveyed land to B., that B. should sell at any higher price, and share the profits with A., is not taken out of the Statute of Frauds by A. finding a purchaser at a higher price.(*z*)

Procuring certain county warrants as the price of land is not sufficient part performance of an oral contract to sell the land for such warrants.(*a*) An oral agreement to buy land from the promisee, who is to buy it of C., first selling his own, is not sufficiently part-performed by the promisee's selling his own land, and buying that of C., in order to carry out the oral contract.(*b*) The

(*r*) *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; *Cooth v. Jackson*, 6 Ves. Jr. 117.

(*s*) *Whitbread v. Brockhurst*, *supra*; *Popham v. Eyre*, Loft, 808; *Thomas v. Brown*, 1 Q. B. D. 720; 35 L. T. N. S. 237; 18 Moak, 152, note; *Myers v. Forbes*, 24 Md. 612; *Smith v. Smith*, 1 Richards. Eq. 134; see *semble* contra, *Bourdillon v. Collins*, 24 L. T. N. S. Rep. 345, and *Thornton v. Henry*, 3 Ill. 218.

(*t*) *Ward v. Hayes*, 19 Grant, Ch. 241.

(*u*) *Clerk v. Wright*, 1 Atk. 12.

(*v*) *Cooke v. Tombs*, 2 Anst. 424, citing and considering cases; *Cole v. White*, *supra*.

(*w*) *Cameron v. Spiking*, 25 Grant, Ch. 117.

(*x*) *Towlerton v. Davidson*, 7 Minn. 411; *Knoll v. Harvey*, 19 Wis. 99; but see *Howe v. Rogers*, 32 Tex. 221, sustaining part performance made before the other party actually obtained his patent of land from the State.

(*y*) *O'Reilly v. Thompson*, 2 Cox, Ch. 271; see *Parker v. Heaton*, 55 Ind. 3; *Curtis v. Buckingham* (Marquis of), 3 V. & B. 168; *Sands v. Thompson*, 43 Ind. 18; *Smith v. Bouck*, 33 Wis. 25.

(*z*) *Ballard v. Bond*, 32 Vt. 358.

(*a*) *Wilson v. The Chicago & R. I. R.*, 41 Ia. 443.

(*b*) *Sands v. Thompson*, 43 Ind. 18.

acts of part performance must relate to the execution of the contract.(c) The plaintiff's taking down at the defendant's request a notice that the premises were to let, is not part performance of a contract of lease; this act having been done before the time to take possession had come.(d)

§ 569. A possession of many years taken as a consequence of the oral contract though not a term thereof, was regarded as sufficient.(e) In another case, speaking of the improvements constituting the alleged part performance, the court said: "True, they were not on the parcels themselves, but their value depended on the possession of the quarry, the only matter which gave either tract E. or F. any value." The improvements were on the quarry, not the tracts; but without the quarry neither the tracts nor the quarry had any value.(f) Possession and improvements having reference to the contract are sufficient,(g) and the possession must be received and maintained under the contract.(h)

Possession must be accompanied by a declaration of intention in taking possession.(i) The strictness of this rule is, however, sometimes relaxed, as the following examples may show. Thus, where a resolution of a municipal board offered certain lands upon condition of the claimant discontinuing a certain suit; such discontinuance is sufficient part performance.(j) Where there was an agreement to settle a family dispute, to sell property real and personal, and to refrain from disputing a will, the court said: "As to its being an agreement concerning land strictly, this is not so; but it relates to a division of the proceeds of real estate, including personality also. Besides, to say nothing of the expense and trouble incurred by one of the complainants in coming in from Arkansas to attend the sale and division, the complainants had executed fully

(c) *Shreve v. Grimes*, 4 Litt. 223.

(d) *Inman v. Stamp*, 1 Stark. 11.

(e) *Harris v. Knickerbacker*, 5 Wend. 643.

(f) *McFerran v. Mont Alto Co.*, 31 Leg. Int. 357.

(g) *Price v. Hart*, 29 Mo. 171; *Potter v. Jacobs*, 111 Mass. 36. And see *infra*: *Semmes v. Worthington*, 38 Md. 317; *Miranville v. Silverthorn*, 1 Grant (Pa.),

411 (where the evidence was thought sufficient for the jury).

(h) *Lumpkin v. Johnson*, 27 Ga. 485; *Spalding v. Conzelman*, 30 Mo. 182; *Printup v. Mitchell*, 17 Ga. 564 (where the claimant had had possession only as a contractor).

(i) *Bean v. Valle*, 2 Mo. 126.

(j) *Grimes v. Hamilton Co.*, 37 Ia. 294.

the agreement on their part, by forbearing to file their *caveat*. It would be a fraud upon them not to compel its performance by the defendants.”(k)

Buying the dominant property in order to extinguish an easement is good part performance.(l) The defendants, who owned certain land, procured the plaintiff to get a conveyance to them of a certain outstanding interest, and promised to convey him one-fourth of the land, &c., and the plaintiff, as agent of the owner of the outstanding claim, made a deed to the defendants; the conveyance in question was held to be a sufficient part performance.(m) Where the promisee discharges land of incumbrances, and procures the mortgaged land to be bought in under a foreclosure, it is, it seems, part performance of a promise to assume the mortgage so as to charge the promisor.(n) Purchasing land and hiring laborers to carry out a contract of sale of chattels may be sufficient part performance.(o)

Purchase of a third party's land by the mortgagor in reliance upon a promise of the mortgagee to take such land and credit it against the mortgage, is sufficient part performance.(p) Where the bill stated that the defendants entered as tenants from year to year, and the answer said as tenants under a verbal lease for years, the answer was held to be proof not only of the contract but that the possession was part performance thereof.(q) Where the acts of part performance may be referred to an agreement passing a lesser estate, they will not take a greater estate out of the Statute of Frauds.(r)

Where a contract of sale of land to X. was assigned by an agreement partly in writing and partly by parol to the defendant, who partly performed, the plaintiff asked to have the writing rescinded that he and X. might go on with their original agreement, and

(k) *Watkins v. Watkins*, 24 Ga. 404, citing *Neale v. Neale*, 1 Keen, 672. See *Bowie v. Bowie*, 1 Md. 94, where, under an alleged contract in consideration of marriage, the court said they would assume the part performance to have been under the contract in absence of evidence to the contrary.

(l) *Pope v. O'Hara*, 48 N. Y. 452.

(m) *Bogart v. Patterson*, 14 Grant, Ch. 627, citing cases.

(n) *Adams v. Smith*, 50 Vt. 7.

(o) *Bryan v. Southwestern R. R.*, 37 Ga. 41.

(p) *Eastburn v. Wheeler*, 23 Ind. 305.

(q) *Morrison v. Peay*, 21 Ark. 110; see *Ludwig v. Leonard*, 9 W. & S. 49.

(r) *Rowton v. Rowton*, 1 Hen. & Mun. 98.

offered the defendant compensation for the part performance. It was held that the defendant could not dispute the oral contract and set up the written agreement subsidiary to it; the plaintiff did not seek to enforce but to overthrow the contract between himself and the defendant, and the latter, seeking to enforce the written portion only of the agreement, could not demur on the ground of the Statute of Frauds but must answer.(s)

§ 570. Where it was doubtful whether the part performance was under an oral agreement of lease for three lives or for one life, no specific performance will be granted.(t) Where each party gives a different version of the contract, one stating a lease of one duration, and the other of another, and there is an unsigned lease written by the lessor put in evidence which supports the contention of one party, and there is no evidence as to the other allegation, the contract will be enforced as claimed by the plaintiff and as supported by the lease written by the lessor, who is represented by the defendants.(u) Improvements made before and after the contract and while the alleged vendee was tenant in common of the land are insufficient part performance.(v) Where the plaintiff has accepted a written lease for one year and taken possession, he cannot, on the ground of part performance, recover on a parol agreement of lease for three years.(w) Where the defendant claimed as purchaser from the guardian of certain minors, who acted also as agent of certain adults, and the deeds showed only a conveyance as guardian, possession and improvements will be referred to the title under the deed, and not to an alleged oral contract by which the guardian also sold, as agent, the interest in the land of certain adults, the plaintiffs.(x)

Where the plaintiff alleged but failed to prove that the defendant held only as mortgagee in trust for him, he cannot on the ground of part performance recover by showing that he was allowed possession by the defendant and paid the latter rent or interest; the former claim is upon title in the plaintiff, the latter upon title in the defendant.(y) Possession and improvements by a tenant

(s) *Jervis v. Berridge*, 42 L. J. Ch. 518.

(w) *Strehl v. D'Evers*, 66 Ill. 79.

(t) *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

(x) *Nay v. Mognain*, 24 Kan. 78, citing cases.

(u) *McFarlane v. Dickson*, 13 Grant, Ch. 277.

(y) *Fullerton v. McCurdy*, 55 N. Y.

(v) *Ludwig v. Leonard*, 9 W. & S. 49. 639.

who has not accepted a proposition to sell which he has a year in which to accept, will be referred to the tenancy and not to his alleged contract to buy.^(z) A plea of the Statute of Frauds is not, however, sufficiently supported by an answer which stated that the defendant is advised that in taking possession he did so only as tenant at will, and therefore is not bound.^(a)

§ 571. Where there was entry, payment of rent, and improvements under an agreement to give a lease, and such verbal letting on the condition of making improvements was a local custom, it was held that the part performance was under the agreement, and an ejectment by the lessor against the lessee was enjoined.^(b) Where it is doubtful whether the acts of part performance are under the contract or not equity will not interfere;^(c) as where it was not shown whether a railroad took possession under its charter or under the alleged contract. Where there is no other title, part performance will be referred to the oral contract.^(d)

Examples sufficient and insufficient. The rule where the contract set up is the only one to which the part performance can be referred, &c.

Under another head will be considered the part performance of a contract of sale of chattels, viz., delivery and acceptance. It need only be noted here that there has been raised the question where acts of part performance will, merely because subsequent to the contract, be referred to the latter, and the New York decisions are altogether divided on the question.^(e) As examples of part performance regarded as being under the contract, see below.^(f) An independent act, though but for the contract it would not have been done, is insufficient.^(g) Thus the sale by the plaintiff with the defendant's knowledge of certain land at a low price, in order to pay the defendant for the land in suit sold orally by the latter to the former, is insufficient part performance.^(h)

(z) *Sutherland v. Parkins*, 75 Ill. 340, 470; *Richmond v. Foote*, 3 Lans. 244; citing *Wood v. Thornly*, 58 id. 464. *Jacobs v. The R. R.*, *supra*; *Gregory v. Mighell*, 18 Ves. 333; *Shilliber v. Jarvis*, 8 DeG. M. & G. 61.

(a) *Bowers v. Cator*, 4 Ves. Jr. 96.

(b) *Thornton v. Ramsden*, 4 Giff. 574, explained and relied on.

(c) *Jacobs v. The R. R.*, 8 Cushing, 224; see *Haisten v. Savannah R. R.*, 51 Ga. 200.

(d) *Rowton v. Rowton*, 1 Hen. & Mun. 98; *Jervis v. Smith*, Hoff. Ch.

(e) *Boutwell v. O'Keefe*, 32 Barb. 434.

(f) *Smith v. Underdunk*, 1 Sandf. Ch. 580.

(g) *Graham v. Theis*, 47 Ga. 479.

(h) *Parker v. Heaton*, 55 Ind. 3.

Where the parties agreed that if the plaintiff would exchange certain land of his for certain land of E. M. and convey the land so obtained from E. M. to the defendant, he, the defendant, would pay a certain price for the same, it was held that the exchange perfected between the plaintiff and E. M. was no part performance of the contract with the defendant.(i) Where, however, S., owning four stores, sold three subject to a right of way in favor of No. 4 which he held, and afterwards the owner of the former, for the purpose of extinguishing the easement, bought No. 4, and S., in conveying this store, expressly released his right in the easement; and the defendant, the owner of one of the three properties first bought, built a stone wall across the ground on which was the easement. It was held that the plaintiff could not, because there was no deed, claim the easement, but that there had been sufficient part performance, *semble*, the purchase of store No. 4.(j) And where one party to a parol exchange partly performed by buying the land he was to give, a preliminary injunction was issued to prevent the other party from disposing of his land to a different person.(k)

Expenditure under a parol promise of gift not at the request of the donor and not in execution of the contract, is insufficient.(l) The part performance of an illegal term of the contract is insufficient.(m) Possession taken and improvements made with a view to the ordinary use of the land are not sufficient in the case of a gift.(n) Possession under a deed with a certain description cannot, as part performance, let in evidence of the sale of other land by parol.(o) Where the land sold is not clearly shown, and therefore the acts of part performance are difficult to refer, specific performance will be refused.(p)

Where valuable improvements are made with the knowledge that the contract will not be performed, there is no sufficient part performance, because this must be with a view of having the contract performed.(q) So where the part performance was after a distinct

(i) *Sands v. Thompson*, 43 Ind. 18; see *Smith v. Bouck*, 33 Wis. 25. See *O'Reilly v. Thompson*, 2 Cox, Ch. 271.

(j) *Pope v. O'Hara*, 48 N. Y. 452.

(k) *Curtis v. (Marquis of) Buckingham*, 3 V. & B. 168.

(l) *McClure v. McClure*, 1 Pa. St. 374.

(m) *Graham v. Theis*, 47 Ga. 479.

(n) *Caldwell v. Williams*, 1 Bailey, Ch. 175.

(o) *Broughton v. Coffey*, 18 Gratt.

197; *Glass v. Hulbert*, 102 Mass. 24.

(p) *Munsell v. Loree*, 21 Mich. 497.

(q) *Park v. Leewright*, 20 Mo. 85.

refusal by the other party to comply with the oral contract.(r) Where the plaintiff on the faith of an oral agreement of lease made by the agent of the lessor went to expense in buying fixtures for the leased property, he is remediless, for neither against the principal nor the agent can he recover in contract or in tort, because, though the agent may have fraudulently assumed authority, he is not liable, because the oral contract would have been invalid even if he had really had authority.(s) For examples of part performance held not to have been under the contract, see below.(t)

§ 572. Improvements or other part performance made before the contract are insufficient.(u) Nothing is part performance which is merely ancillary or preparatory.(v) Where it is doubtful as to whether the alleged part performance preceded or followed the contract, the part performance is insufficient.(w) In a Canada case, though possession had been wrongfully taken under a prior invalid contract, yet as it was continued under the contract in suit and was assented to and was accompanied by improvements made, it was held to be sufficient.(x) Repairs by a tenant under an old lease in expectation of a new one are insufficient part performance.(y)

Part performance before the contract insufficient (further considered).

Where one knowing he had no rights, chose to improve the land of another in hopes of getting a lease, he cannot have either the lease or compensation.(z) Expenditures by the lessor in buying fixtures, &c., in the hope of carrying out the lease in suit are insufficient, as has been seen.(a) Where the plaintiff built a private railroad at his own cost connecting with the defendants' line and by their general assent, the precise terms under which the branch road was to be used being left for future determination, and a verbal understanding as to tolls, &c., having been arrived at, the plaintiff used

(r) *Ann Berta Lodge v. Leverton*, 42 24 Pa. St. 33; *Eckert v. Eckert*, 3 P. & Tex. 25. W. (Pa.) 362.

(s) *Dung v. Parker*, 52 N. Y. 494.

(v) *Williams v. Morris*, 95 U. S. S. C.

(t) *Osborn v. Phelps*, 19 Conn. 74.

456; *Whaley v. Bagnel*, 1 Bro. P. C.

(w) *Lumpkin v. Johnson*, 27 Ga. 485;

345; *Smith v. Bouck*, 33 Wis. 25.

Towlerton v. Davidson, 7 Minn. 411;

(w) *Harris v. Richey*, 56 Pa. St. 401.

Billingslea v. Ward, 33 Md. 51; *Myers*

(z) *Jennings v. Robertson*, 3 Grant, Ch. 517.

v. Byerly, 45 Pa. St. 371; and see *supra*

Williams v. Morris, 95 U. S. S. C. 456.

(y) *Byrne v. Romaine*, 2 Edw. Ch. 445.

For further examples see *Congdon v.*

(z) *Ramsden v. Dyson*, L.R. 1 H.L. 165.

Darcy, 46 Vt. 484; *Dougan v. Blocher*,

(a) *Dung v. Parker*, 52 N. Y. 496.

the road for two years and a half, when the defendants proposed to take up the rails; to a bill for an injunction the defendants demurred and set up the Statute of Frauds; the court, however, overruled the demurrer, saying that the plaintiff was entitled to use the road upon reasonable terms, and the two years' usage showed what was reasonable, and that the building the road was not before the contract but was under it; that is to say, that it was with the defendants' acquiescence that the road was built by the plaintiff, and that so much of the contract as related to the use of the finished road, and which was at first left undetermined, was afterwards settled by the acts of the parties.(b)

§ 573. As part performance may be premature, so it may be too late; and this equitable doctrine will not therefore be invoked to raise up a trust from the sending of a message which was not dispatched till after the delivery of an absolute deed.(c) Improvements made *post litem motam*, though with materials obtained before, are insufficient part performance.(d) So possession taken after the contract made by an agent has been disavowed by the principal.(e) And so where possession is given not under the agreement in suit but under a subsequent one.(f) The evidence must clearly show that the acts of part performance are under the contract.(g) Whether the possession was taken under the contract, and what the contract was, if any, is a question for the jury.(h)

For examples of acts of part performance held not to be sufficiently connected with the contract, see below.(i) The part performance must be of the contract as understood by the party sought to be charged.(j)

(b) *Laird v. Birkenhead R. W., Johns. Ch. (English), 508.*

(c) *Rathburn v. Rathburn, 6 Barb. 98.*

(d) *Aurand v. Wilt, 9 Pa. St. 54.*

(e) *Poland v. O'Connor, 1 Neb. 50.*

(f) *Owings v. Baldwin, 8 Gill, 338.*

(g) *McMurtrie v. Bennett, Harr. (Mich.) 126; Nicol v. Tackaberry, 10*

Grant, Ch. 115; McElhenny v. Hope, 25 Pitts. Leg. Jour. 78.

(h) *Detrick v. Sharrar, 10 W. N. Cas. 289; 95 Pa. St. 521.*

(i) *Sitton v. Shipp, 65 Mo. 298; see Alderson v. Maddison, 7 Q. B. D. 174, supra; Detrick v. Sharrar, supra.*

(j) *Lester v. Kinne, 37 Conn. 9.*

CHAPTER XXVI.

ACTS OF PART PERFORMANCE—POSSESSION, IMPROVEMENTS,
PAYMENTS, &c.

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| <p>§ 574. The full measure of part performance.</p> <p>§ 575. Delivery of possession pursuant to contract notorious and exclusive.</p> <p>§ 576. Possession must be maintained.</p> <p>§ 577. Possession and improvements sufficient; or possession and payment.</p> <p>§ 578. Possession indispensable and alone sufficient.</p> <p>§ 579. The virtue of mere possession questioned.</p> <p>§ 580. How far possession must be accompanied by improvements or payment.</p> <p>§ 581. Sufficient part performance; delivery of part of land; delivery of possession generally.</p> <p>§ 582. The rule applied to leases, exchange, &c.</p> <p>§ 583. Partition.</p> <p>§ 584. Settlement of dispute as to boundary; gift; part delivery, &c.; and general examples of insufficient possession.</p> <p>§ 585. Continuance in possession.</p> <p>§ 586. The holder of former possession may surrender it and take new possession; payment of higher rent.</p> | <p>§ 587. Examples under the general question; question of continuance in possession.</p> <p>§ 588. Improvements good part performance; what is requisite; examples.</p> <p>§ 589. Further examples.</p> <p>§ 590. Payment a circumstance of part performance.</p> <p>§ 591. Payment not essential.</p> <p>§ 592. Payment alone insufficient part performance.</p> <p>§ 593. Contra.</p> <p>§ 594. General examples of part payment as insufficient part performance.</p> <p>§ 595. Miscellaneous acts of part performance; payment of taxes, &c.</p> <p>§ 596. Transfer of land to third persons and part performance of similar character by change of title or interest.</p> <p>§ 597. Tender of deed in part performance.</p> <p>§ 598. Marriage as part performance, and part performance of contracts between those married or about to marry.</p> <p>§ 599. Miscellaneous examples of part performance.</p> |
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§ 574. THE full measure of the part performance of an oral contract relating to land which shall be sufficient in equity to take the case out of the Statute of Frauds is as follows: The delivery and receipt of notorious and exclusive possession pursuant to the contract; the making of

The full
measure of
part per-
formance.

valuable and permanent improvements for which the use of the land is not an adequate return, and which cannot be compensated in damages; and the payment of the whole or of part of the stipulated price.(a) In an Illinois case, speaking of a parol contract relating

(a) *Underhill v. Williams*, 7 Blackf. 126; *Brock v. Cook*, 3 Porter (Ala.), 464; *Toney v. Moore*, 2 Stew. & Port. 355; *Cummings v. Gill*, 6 Ala. 562; *Keatts v. Rector*, 1 Ark. 391; *Morrison v. Peay*, 21 Ark. 110; *Kellums v. Richardson*, 21 Ark. 139; *Terry v. Rosell*, 32 Ark. 487; *Arguello v. Edinger*, 10 Cal. 158; *Burtch v. Hogge*, Harring. Ch. 46; *Black v. Black*, 15 Ga. 450; *Scott v. Newsom*, 27 Ga. 132; *Lumpkin v. Johnson*, 27 Ga. 485; *Alderman v. Chester*, 34 Ga. 158; *Updike v. Armstrong*, 4 Ill. 565; *Thornton v. Henry*, 2 Scam. 220; *Langston v. Bates*, 9 Chic. Leg. News, 380; *Keys v. Test*, 33 Ill. 819; *Hamilton v. Rook*, 62 Ill. 141; *Northrop v. Boone*, 66 Ill. 368; *Adkinson v. Tanner*, 68 Ill. 248; *Temple v. Johnson*, 71 Ill. 16; *Gosse v. Jones*, 73 Ill. 510; *Laird v. Allen*, 82 Ill. 43; *McDowell v. Lucas*, 97 Ill. 493; *Atkinson v. Jackson*, 8 Ind. 33; *Armstrong v. Fearnow*, 67 Ind. 433; *Humphrey v. Mone*, 17 Ia. 194; *Renwick v. Bancroft*, 9 Nor. West. Rep. 368 (S. C. Ia.); *Gregg v. Hamilton*, 12 Kan. 335; *Shepherd v. Bevin*, 9 Gill, 32; *Haines v. Haines*, 6 Md. 435; *Smith v. Crandall*, 20 Md. 500; *Semmes v. Worthington*, 38 Md. 298; *Glass v. Hulbert*, 102 Mass. 24; *Seager v. Burns*, 4 Minn. 147; *Neef v. Seely*, 49 Mo. 211; *Foster v. Kimmons*, 54 Mo. 493; *Newton v. Swazey*, 8 N. H. 13; *Jamison v. Miller*, 27 N. J. Eq. 590; *Wetmore v. White*, 2 Caines' Cases, 109; *Massey v. McIlwain*, 2 Hill's Ch. 426; *Richmond v. Foote*, 3 Lansing, 244; *Lowry v. Tew*, 3 Barb. Ch. 407; *Williston v. Williston*, 41 Barb. 635; *McCray v. McCray*, 30 Barb. 635; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 34; *Winans v. La Grange*, 3 City Hall Rec. (N. Y.) 155; *Miller v. Ball*, 64 N. Y. 291; *Syler v. Eckhart*, 1 Binn. 380; *Baseler v. Niesly*, 2 S. & R. 352; *Galbreath v. Galbreath*, 5 Watts, 149; *Martin v. McCord*, 5 Watts, 493; *Haslet v. Haslet*, 6 Watts, 464; *Young v. Glendenning*, 6 Watts, 509; *Robertson v. Robertson*, 9 Watts, 36; *Wible v. Wible*, 1 Grant, 406; *Pattison v. Horn*, 1 Grant's Cases, 301; *Farley v. Stokes*, 1 Pars. Eq. Rep. 422; *Eckert v. Mace*, 3 P. & W. 364; *Cravener v. Bowser*, 4 Pa. St. 259; *Aurand v. Wilt*, 9 id. 54; *McFarson's Appeal*, 11 id. 503; *Aitkin v. Young*, 12 id. 24; *Moore v. Small*, 19 id. 461; *Rankin v. Simpson*, 19 id. 471; *Greenlee v. Greenlee*, 22 id. 237; *Blakeslee v. Blakeslee*, 22 id. 243; *Dougan v. Blocher*, 24 id. 28; *Workman v. Guthrie*, 29 id. 495; *Washbaugh v. Entriken*, 36 id. 517; *Patton v. Borough of Hollidaysburg*, 40 id. 208; *Lauer v. Lee*, 42 id. 170; *McLain v. School Directors*, 51 id. 196; *McGibbeny v. Burmaster*, 53 id. 332; *Milliken v. Dravo*, 67 id. 230; *Shellhammer v. Ashbaugh*, 83 id. 24; *Gordonier v. Billings*, 77 id. 501; *Overmeyer v. Koerner*, 2 W. N. C. 6; *Dugan v. Colville*, 8 Tex. 126; *Ottenhouse v. Burleson*, 11 id. 88; *Neatherly v. Ripley*, 21 id. 435; *Howe v. Rogers*, 32 id. 221; *Robinson v. Davenport*, 40 id. 341; *Ponce v. McWhorter*, 50 id. 571; *Root v. Collins*, 84 Vt. 174; *Hedrick v. Hern*, 4 W. Va. 625; *Lowry v. Buffington*, 6 id. 255; *Vickers v. Sisson*, 10 id. 17; *Tracy v. Tracy*, 14 id. 248; *Smith v. Armstrong*, 24 Wis. 449; *Ingles v. Patterson*, 36 Wis. 377; and see the cases cited above.

to land, the court said : " Where such a contract, though verbal, is shown to have been fairly made on a valuable consideration, the whole or a considerable portion of the purchase-money paid, and no unreasonable and vexatious delays in paying the whole, possession taken, and valuable improvements made, and the vendee showing no disposition to evade the contract, and no hardship in it, and no evidence of abandonment by the vendee, this court has, in many instances, decreed a specific performance of the contract by compelling the execution of a deed." (b)

So where parol contracts are made on a valuable consideration, and the whole or a considerable part of the purchase-money paid, possession taken, and valuable improvements made, all under the contract, and there be no hardship in it, such contracts will be enforced. (c) And so, speaking of an oral agreement relating to land, it was said in another instance that " even if the contract were within the statute the payment of the purchase-money, the location of the land, the procuring the patent, and the possession and improvement made upon it by the defendant and those under whom he claims, would, as has frequently been decided by this court, have presented sufficient equity to have entitled the defendant to a decree of title, if he had brought a suit for this purpose within a reasonable and proper time. And it certainly could not be less effectual to protect him against the wrongful efforts of the vendor to deprive him of his possession and equitable title to the land, however long he may have delayed his suit for this purpose." (d)

§ 575. As has already been said, one of the features of equitable part performance is the delivery and receipt of notorious and exclusive possession. (e) Possession taken, valuable and lasting improvements made, payment of part and tender of the remainder of the price, make up adequate part performance; (f) when pursuant to the

Delivery, &c., of possession pursuant to contract, notorious and exclusive.

(b) *D'Wolf v. Pratt*, 42 Ill. 257, citing cases.

(c) *Cuddy v. Brown*, 78 Ill., 420.

(d) *Cox v. Bray*, 28 Tex. 261, citing cases.

(e) *Aitkin v. Young*, 12 Pa. St. 24; *Greenlee v. Greenlee*, 22 id. 235; *Brawdy v. Brawdy*, 7 id. 157; *Hart v. Carroll*, 85 id. 510; 5 W. N. C. 376; *Hill*

v. Meyers, 43 id. 172; *Frye v. Shepler*, 7 id. 91; *Ludwig v. Leonard*, 9 W. & S. 49; *Burton v. Duffield*, 2 Del. Ch. 134; *Wright v. Pucket*, 22 Gratt. 374; *White v. Watkins*, 23 Mo. 421; *Ellsworth v. Hale*, 33 Ark. 636. See the cases cited *supra*.

(f) *Higbee v. Moore*, 66 Ind. 264.

contract.(g) These are sufficient especially when there has been full payment and the vendor is insolvent.(h) In California, Texas, and the other portions of the United States acquired from Spain or Mexico, the effect of the delivery of possession of land under an oral contract has been considered, and in California it has been held that whether such contracts are valid or not taken alone under the Spanish law, the delivery of possession has an effect analogous to that of livery of seisin at common law.(i)

The possession must be notorious and exclusive.(j) Thus, where the plaintiff worked for persons owning a mine, and was to be paid by a certain interest in the enterprise, his possession being under that of the owners was no notice to a *bona fide* purchaser of the interest of the latter.(k) The possession of a mining claim does not, in order to give title, have to be by actual inclosure or its equivalent.(l) So a parol contract between a husband and wife for the sale to the latter of certain land belonging to the husband is not, by payment of the consideration-money and possession held by the wife together with her husband, taken out of the Statute of Frauds.(m)

Where, under an oral agreement to reconvey a life estate to him, a husband conveys land to his wife and remains in possession, it was thought in a New York case that he might through his part performance have a right to specific enforcement, and that at any rate he had an insurable interest.(n) An alleged oral gift from a father to his son living with him is not taken out of the statute where there is no adjustment of boundaries and no change of possession.(o) And where two buy together, one pays and the other is to have an undivided moiety, the latter cannot take as against the former such possession as will be sufficient part performance.(p)

(g) *White v. Watkins*, 23 Mo. 421; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. C. 376; *Hill v. Meyers*, 43 Pa. St., 172. See the cases cited *supra*.

(h) *Jamison v. Dimock*, 11 Pitts. L. J. N. S. 56 (95 Pa. St. 52).

(i) *Hoen v. Simmons*, 1 Cal. 121; *Riddle v. Ratliff*, 8 La. Ann. 108 (saying that the possession taken must be maintained).

(j) *Aitkin v. Young*, 12 Pa. St. 24.

(k) *Jenkins v. Redding*, 8 Cal. 603.

(l) *Patterson v. Keystone Co.*, 23 Cal. 576.

(m) *Cuppy v. Hixon*, 29 Ind. 522; see *Hixon v. Cuppy*, 33 Ind. 210.

(n) *Bedfield v. Holland Purchase Ins. Co.*, 56 N. Y. 357.

(o) *Shellhammer v. Ashbaugh*, 83 Pa. St. 28; see *Zimmerman v. Wengert*, 81 Pa. St. 401; see *Ham v. Goodrich*, 33 N. H. 32; *Orr v. Orr*, 21 Grant, Ch. 413.

(p) *Chadwick v. Felt*, 35 Pa. St. 306.

As the possession to oust the Statute of Frauds must be exclusive, concurrent possession with that of the vendor of the land under an alleged oral sale of a part of a larger tract occupied by the vendor is insufficient, the boundaries not being defined or the possession separate.(q) It seems also that possession jointly with the vendor is insufficient, though the plaintiff seeded the ground, planted trees, &c., the improvements being capable of compensation.(r) Where, in the case of a gift, the donor remains in possession with the donee, the latter's possession is insufficient.(s)

Joint possession is admissible as corroborative proof of title, where there is a deed showing the joint title.(t) Where, however, it is a term of a contract that there should be joint possession, it has been said that the part performance might be sufficient.(u) It has been said that from possession in common for a long time title in common would be presumed.(v) Possession taken by a tenant of the claimant is sufficient.(w) Where a son moved to his father's land, took care of it and of him upon the promise of a conveyance of a certain tract of the farm, possession as part performance was held to be sufficient owing to the change of life therein involved, which cannot be paid for; and exclusive possession was considered not to be always necessary.(x)

§ 576. The possession taken must be maintained.(y) It is not

(q) *Frye v. Shepler*, 7 Pa. St. 91, citing *Haslet v. Haslet*, 6 Watts, 467; see *Leslie v. Smith*, 32 Mich. 67.

(r) *Tufts v. Tufts*, 3 Wood & M. 476.

(s) *Brown v. Lord*, 7 Or. 309.

(t) *Lick v. Diaz*, 44 Cal. 479.

(u) *Watson v. Mahan*, 20 Ind. 226.

(v) *Jackson v. Vosburgh*, 9 Johns. 276.

(w) *Beard v. Bricker*, 2 Swan, 50.

(x) *Lamb v. Hinman*, 8 Nor. W. Report. 709.

(y) *Aylesford's (Earl of) Case*, 2 Strange, 783; *Reddin v. Jarman*, 16 L. T. N. S. 449; *Brock v. Cook*, 3 Porter (Ala.), 464; *Cummings v. Gill*, 6 Ala. 562; *Chamblis v. Smith*, 30 Ala. 366; *Keatts v. Rector*, 1 Ark. 391; *Morrison v. Peay*, 21 Ark. 110; *Melton v. Lam-*

bard, 51 Cal. 258; *Printup v. Mitchell*, 17 Ga. 564; *Lumpkin v. Johnson*, 27 Ga. 485; *Updike v. Armstrong*, 4 Ill. 565; *Williamson v. Williamson*, 4 Ia. (Clarke), 282; *Meriwether v. Meriwether*, 3 Litt. (Ky.) 418; *Haines v. Haines*, 6 Md. 435; *Riddle v. Radliff*, 8 La. Ann. 108; *Semmes v. Worthington*, 38 Md. 298; *Glass v. Hulbert*, 102 Mass. 24; *Spalding v. Conzelman*, 30 Mo. 182; *Lowry v. Tew*, 3 Barb. Ch. 407; *Wetmore v. White*, 2 Caines' Cases, 109; *Massey v. McIlwain*, 2 Hill's Ch. 426; *Aldrich v. Putney*, 11 Paige, 205; *Richmond v. Foote*, 3 Lansing, 244; *Williston v. Williston*, 41 Barb. 635; *Lobdell v. Lobdell*, 36 N. Y. 327; *Freeman v. Freeman*, 43 N. Y. 34; *Miller v. Hower*, 2 Rawle, 55; *Syler v. Eckhart*, 1 Binn. 380; *Bassler v. Niesly*, 2 S. & R. 352;

Possession must be maintained.
 sufficient that a mere technical possession is taken, as by once walking over the land.(z) Possession taken before the oral agreement was complete, and afterwards given up, is insufficient;(a) so where the vendee attorns as tenant to the vendor.(b) Where the question turned upon a right of settlement it was held that there must in England be an estate at least equitable, and that a mere equitable *right* was not enough; therefore, where a pauper took possession of land under a contract to pay £40 and paid £30, and afterwards sold and gave up possession and finally paid the remaining £10, he had no estate which would give him a settlement.(c) It has, however, been held that possession once taken need not be continued to the date of suit,(d) and where there had been also improvements and part payment and the Statute of Frauds was not pleaded, specific performance was decreed of an oral contract, though the vendor had afterwards obtained possession of the land.(e)

Notorious possession delivered and taken, though held only for two days, was in a Canadian case considered sufficient.(f)

§ 577. Possession and improvements are sufficient part performance.(g) Possession, though accompanied by improvements, if not

Farley v. Stokes, 1 Pars. Eq. Rep. 422; 501; *Dugan v. Colville*, 8 Tex. 126; *Wible v. Wible*, 1 Grant (Pa.), 406; *Burleson v. Burleson*, 11 Tex. 2; *Rhea v. Jordan*, 28 Gratt. 682.

Mace, 3 P. & W. 364; *Martin v. McCord*, 5 Watts, 493; *Galbreath v. Galbreath*, 5 id. 149; *Haslet v. Haslet*, 6 id. 464; *Young v. Glendenning*, id. 509; *Robertson v. Robertson*, 9 id. 36; *Aurand v. Wilt*, 9 Pa. St. 54; *Cravener v. Bowser*, 4 id. 262; *Aitkin v. Young*, 12 id. 15; *Moore v. Small*, 19 id. 461; *Rankin v. Simpson*, id. 471; *Greenlee v. Greenlee*, 22 id. 237; *Blakeslee v. Blakeslee*, id. 243; *Dougan v. Blocher*, 24 id. 28; *Workman v. Guthrie*, 29 id. 495; *Lauer v. Lee*, 42 id. 170; *McLain v. School Directors*, 51 id. 196; *McGibbeny v. Burmaster*, 53 id. 332; *Milliken v. Dravo*, 67 id. 230; *Deardorff v. Weaver*, 25 Pittsburgh L. J. 62; *Overmeyer v. Koerner*, 2 W. N. C. 6; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. Cas. 376; *Gordonier v. Billings*, 75 Pa. St. 501;

Dugan v. Colville, 8 Tex. 126; *Burleson v. Burleson*, 11 Tex. 2; *Rhea v. Jordan*, 28 Gratt. 682.

(z) *Frostburg Coal Co. v. Thistle*, 20 Md. 190; S. C. 10 Md. 129, *sub nom.* *Thistle v. Frostburg Coal Co.*

(a) *Dougan v. Blocher*, 24 Pa. St. 33.

(b) *Rankin v. Simpson*, 19 Pa. St. 471.

(c) *Rex v. Llantillio*, 5 B. & C. 463; 8 D. & R. 320. See *Black v. Black*, 2 Grant, Err. & App. 424; S. C. below, 9 Grant, Ch. 403, for an example of possession insufficient because not maintained.

(d) *Neatherly v. Ripley*, 21 Tex. 435.

(e) *Adkinson v. Tanner*, 68 Ill. 247.

(f) *Cameron v. Spiking*, 25 Grant, Ch. 117.

(g) *Pengall (Lord) v. Rosa*, 2 Eq. Cas. Abr. 46; *Clerk v. Wright*, 1 Atk. 12; *Farrall v. Davenport*, 3 Giff. 368; 8 Jur. N. S. 862; affirmed 8 Jur. 1043;

under the contract is insufficient.(h) But how far so in the case of a gift, see note below.(i) Where the possession was jointly with the vendor, and the improvements could be compensated for in damages, the part performance is insufficient.(j) Possession and payment are sufficient.(k) It seems that in Kentucky in 1819 this

Possession and improvements sufficient; or possession and payment.

Millard v. Harvey, 34 Beav. 237; Cowell v. Watts, 2 Hall & Twells, 229, 19 L. J. Ch. 455; Burns v. Burns, 21 Grant, Ch. 7; Conway v. Sherron, 2 Cranch, C.C. 80; Neale v. Neales, 9 Wall. 9; Tohler v. Folson, 1 Cal. 210; Weber v. Marshall, 19 Cal. 460; Owen v. Frink, 24 Cal. 175; Burton v. Duffield, 2 Del. Ch. 134; Mims v. Lockett, 33 Ga. 16; Steel v. Payne, 42 Ga. 208; Rosser v. Harris, 48 Ga. 512; Blunt v. Tomlin, 27 Ill. 93; Fowler v. Redican, 52 Ill. 405; Deniston v. Hoagland, 67 Ill. 268; Mix v. Baldue, 78 Ill. 217, 218; Watson v. Mahan, 20 Ind. 226; Fall v. Hazelrigg, 45 Ind. 576; Law v. Henry, 39 Ind. 414; Peters v. Jones, 35 Ia. 517; Renkin v. Hill, 49 Ia. 271; Butler v. Kaulback, 8 Kan. 675; Clary v. Marshall, 5 B. Mon. 269; Hardesty v. Richardson, 44 Md. 621; Bennett v. Phelps, 12 Minn. 332; Gill v. Newell, 13 Minn. 468; Huff v. Price, 50 Mo. 230; Evans v. Lee, 12 Nev. 399; Ewing v. Gordon, 49 N. H. 458; Downing v. Risley, 2 McCarter, 96; France v. France, 4 Halst. 650; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 280; Malins v. Brown, 4 Comst. 407; Borst v. Zeh, 12 Hun, 316; Dana v. Wright, 23 Hun, 32; Thomas v. Brown, 10 Ohio St. 249; Syler v. Eckhart, 1 Binn. 380; Johnston v. Johnston, 6 Watts, 371; Simpson v. Breckenridge, 32 Pa. St. 290; Ardery v. Bowles, 71 Pa. St. 359; Deardorff v. Weaver, 25 Pittsburg L. J. 62; Gordonier v. Billings, 1 W. N. C. 422; 77 Pa. St. 501; Wilkinson v. Wilkinson, 1 Des. Ch. 201; Dugan v. Colville, 8 Tex. 126; Burleson v. Burleson, 11 Tex. 2; Taylor

v. Ashley, 15 Tex. 51; Wood v. Jones, 35 Tex. 66; Willis v. Matthews, 46 Tex. 482; Boykin v. Smith, 3 Munf. 102; Banks v. Poitiaux, 2 Rand. 141; Rhea v. Jordon, 28 Gratt. 682; Lester v. Lester, 28 Gratt. 734.

(h) Wood v. Thornly, 58 Ill. 468. See *supra*.

(i) Boze v. Davis, 14 Tex. 334.

(j) Tufts v. Tufts, 3 Wood & Min. 476.

(k) Borrett v. Gomeserra, Bunb. 94; Butler v. Powis, 2 Coll. 161; Floyd v. Buckland, Freem. Ch. 268; Farquharson v. Williamson, 1 Grant, Ch. 95; Walsh v. Rundlette, 2 McArthur, 120; Cope v. Williams, 4 Ala. 364; Brewer v. Brewer, 19 Ala. 488 (*semble*); Arrington v. Porter, 47 Ala. 721; Heflin v. Bingham, 56 Ala. 574; King v. Meyer, 35 Cal. 649; Jones v. Marks, 47 Cal. 248; Church v. Sterling, 16 Conn. 400; Pritchard v. Todd, 38 Conn. 413; Haisten v. Savannah R. R., 51 Ga. 200; Wimberly v. Bryan, 55 Ga. 199; Shirley v. Spencer, 4 Gilm. 600 (*semble*); Ramsey v. Liston, 25 Ill. 115; Temple v. Johnson, 71 Ill. 16; Sanm v. Stingley, 3 Coles (Ia.), 516; Trayer v. Reeder, 45 Ia. 273; Harrison v. Harrison, 1 Md. Ch. Dec. 335; Bomier v. Caldwell, 8 Mich. 474-5; Finucane v. Kearney, 1 Freem. Ch. 68; Keisselbrack v. Livingston, 4 Johns. Ch. 147; Ellis v. Ellis, 1 Dev. Eq. 241; Clarke v. Vankirk, 14 S. & R. 354; Calhoun v. Hays, 8 W. & S. 131; Aurand v. Wilt, 9 Pa. St. 54; Butterfield's Appeal, 77 id. 199; Detrick v. Sharrar, 95 id. 521; Cox v. Cox, Peck (Tenn.), 455; Fisk v. Miller, 13 Tex. 228; Pike v. Morey, 32

rule did not obtain.(l) Possession and full payment are sufficient part performance.(m)

Where a lessor took a fine from the lessees and rent, and allowed them to possess the land, the part performance was sufficient.(n) Possession with payment was thought in Iowa to give an interest in the land, at least to the extent of the payment.(o)

§ 578. Possession is indispensable.(p) If notorious and exclusive possession of land under a parol contract is not taken, it seems that even improvements which cannot be compensated in damages are not sufficient part performance.(q) Possession without more is sufficient.(r)

Possession indispensable and alone sufficient.

Vt. 37; *Hicks v. Riddick*, 28 Gratt. 421; *Fisher v. Moolick*, 13 Wis. 321.

(l) *Letcher v. Cosby*, 2 A. K. Marsh. 106.

(m) *Hanlon v. Wilson*, 10 Neb. 141.

(n) *Rice v. O'Connor*, 12 Ir. Ch. 433.

(o) *White v. Butt*, 32 Ia. 344.

(p) *Williams v. Morris*, 95 U. S. S. C. 456-7; *Hart v. McClellan*, 41 Ala. 252; *Anderson v. Simpson*, 21 Ia. 399; *Stafford v. Bartholomew*, 2 Carter, 153; *Kelley v. Stanberry*, 13 Ohio, 408; *Farley v. Stokes*, 1 Pars. Eq. 428-430; *Wible v. Wible*, 1 Grant (Pa.), 408; *Toe v. Toe*, 3 Grant (Pa.), 74; *Ludwig v. Leonard*, 9 W. & S. 49; *Pfeifer v. Landis*, 1 Watts, 392; *McFarland v. Hall*, 3 id. 38; *Haslet v. Haslet*, 6 id. 467; *McKee v. Phillips*, 9 id. 86; *Sage v. McGuire*, 4 W. & S. 228; *Miller v. Specht*, 11 Pa. St. 455; *Christy v. Barnhart*, 14 id. 260; *Moore v. Small*, 19 id. 465; *Workman v. Guthrie*, 29 id. 495; *Hill v. Meyers*, 43 id. 172; *Moss v. Culver*, 64 id. 424; *Smith v. Smith*, 14 Vt. 445; *Smith v. Finch*, 8 Wis. 249.

(q) *Wible v. Wible*, 1 Grant (Pa.), 409.

(r) *Clerk v. Wright*, 1 Atk. 12; *Aylesford's (Earl of) Case*, 2 Strange, 783; *Inman v. Stamp*, 1 Starkie, 11; *Morphet v. Jones*, 1 Swanst. 181; *Pyke v.*

Williams, 2 Vern. 456; *Butcher v. Stapely*, 1 Vern. 363; 1 Eq. Cas. Ab. 21, pl. 9; *Lord Pengall v. Ross*, 2 Eq. Cas. Ab. 46; *Reynolds v. Waring, Younge*, Ch. 346; *Ex parte Cooper*, 3 M. D. & DeG. 719; *Coles v. Pilkington*, L. B. 19 Eq. 178; *Reddin v. Jarman*, 16 L. T. N. S. 449; *Ungley v. Ungley*, 5 Ch. D. 890; 25 W. R. 734; 46 L. J. Ch. 854; 37 L. T. N. S. 53; 22 Moak, 539 n.; S. C. below, 4 Ch. D. 75; *Palmer v. White, Wallis (Lyne)*, 22; *Norris v. Cooke*, 7 Ir. C. L. Rep. 41; *Savage v. Carroll*, 1 Ball & B. 281; *Kine v. Balfie*, 2 id. 343; *Callaghan v. Pepper*, 2 Ir. Eq. 401; *Steevens Hospital v. Dyas*, 15 Ir. Ch. 420; *Cameron v. Spinking*, 25 Grant, Ch. 117; *Purcell v. Miner*, 4 Wall. 513; *Ex parte Storer, Davies' Rep.* 297; *Conway v. Sherron*, 2 Cranch, C. C. 80; *Worthington v. McRoberts*, 7 Ala. 814; *Byrd v. Odem*, 9 id. 755; *Gillespie v. Battle*, 15 id. 279; *Brewer v. Brewer*, 19 id. 488; *Keatts v. Rector*, 1 Ark. 418; *Blakeny v. Ferguson*, 2 Eng. (Ark.) 278; *McNeill v. Jones*, 21 Ark. 277 (citing *Gregory v. Mighell*); *Arguello v. Edinger*, 10 Cal. 150; *Weber v. Marshall*, 19 Cal. 460; *Eaton v. Whitaker*, 18 Conn. 231; *Thornton v. Henry*, 2 Scamm. 218; *Shirley v. Spencer*, 4 Gilm. 600; *Hawkins v. Hunt*, 14 Ill. 43; *Ramsey v. Lis-ton*, 25 Ill. 114; *Fitzsimmons v. Allen*,

This doctrine is a long-established one. Vice-Chancellor Malins in a late case said that possession for an hour was sufficient part performance.^(s)

As has been already said,^(t) possession was considered as amounting to part performance, because, if the oral contract were not specifically enforced, the party would be liable as a trespasser.^(u) But the notion has been more than once suggested that the delivery of possession was, by its notoriety, a substitute for the writing required by the Statute of Frauds.^(v) Especially in Pennsylvania have the courts taken this view.^(w) Possession delivered and long enjoyed under a sealed agreement may amount to an actual demise,

Admr, 39 Ill. 440; *Tibbs v. Barker*, 1 Blackf. 58; *Underhill v. Williams*, 7 Blackf. 125; *Watson v. Mahan*, 20 Ind. 226; *Eastburn v. Wheeler*, 23 Ind. 305; *Baldwin v. Thompson*, 15 Ia. 504; *Chamberlin v. Robertson*, 31 Ia. 408; *Fairbrother v. Shaw*, 4 Ia. 570; *Curnutt v. Roberts*, 11 B. Mon. 42; *Overstreet v. Rice*, 4 Bush (Ky.), 3; *Harrison v. Harrison*, 1 Md. Ch. Dec. 334; *Dugan v. Githings*, 3 Gill, 158; *Drury v. O'Connor*, 6 Harr. & J. 288; *Morris v. Harris*, 9 Gill, 19; *Weed v. Terry*, 2 Doug. (Mich.) 351; *Wilson v. Wilson*, 6 Mich. 13; *Gill v. Newell*, 13 Minn. 468; *Scott v. Bush*, 26 Mich. 421; *Ott v. Garland*, 7 Mo. 28; *Young v. Montgomery*, 28 Mo. 604; *Tilton v. Tilton*, 9 N. H. 389; *Ayer v. Hawks*, 11 N. H. 152; *Kidder v. Barr*, 35 N. H. 253; *Ashmore v. Evans*, 3 Stockt. 151; *Green v. Richards*, 8 C. E. Green, 33; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 280; *Lowry v. Tew*, 3 Barb. Ch. 413; *Jervis v. Smith*, Hoff. Ch. 470; *More v. Smedburgh*, 8 Paige, 607; *Beebe v. Dowd*, 22 Barb. 255 (a case of exchange of lands); *Traphagen v. Traphagen*, 40 Barb. 537; *Malloy v. Lyons*, 1 N. Y. Weekly Dig. 369; *Moore v. Beasley*, 3 Ham. 296; *Waggoner v. Speck*, 3 Ham. 292; *Armstrong v. Kattenhorn*, 11 Ohio, 271; *Billington v. Welch*, 5 Binn. 129; *Gilday v. Watson*, 2 S. & R. 407; *Jones v. Peterman*, 3 id. 547-8;

Miller v. Hower, 2 Rawle, 55; *Parish v. Koons*, 1 Pars. Eq. 89; *Pfeiffer v. Landis*, 1 Watts, 392; *McFarland v. Hall*, 3 id. 37; *Woods v. Farmer*, 10 id. 195; *Allen's Estate*, 1 W. & S. 385; *Pugh v. Good*, 3 id. 57; *Sage v. McGuire*, 4 id. 228; *Folmer v. Dale*, 9 Pa. St. 83; *Miller v. Specht*, 11 id. 455; *Reed v. Reed*, 12 id. 117; *Christy v. Barnhart*, 14 id. 260; *Moore v. Small*, 19 id. 461; *Reynolds v. Hewett*, 27 id. 176; *Ackerman v. Fisher*, 57 id. 457; *Moss v. Culver*, 64 id. 424; *Palmer v. Richardson*, 3 Strobb. 22; *Anderson v. Chick*, *Bailey's Eq.* 118; *Smith v. Smith*, 1 Rich. Eq. 130; *Townsend v. Sharp*, 2 Overt. 192; *Atkinson v. Bell*, 18 Tex. 479; *Neatherly v. Ripley*, 21 Tex. 435; *Hodges v. Green*, 28 Vt. 358; *Pike v. Morey*, 32 Vt. 37; *Parrill v. McKinley*, 9 Gratt. 1.

(s) *Ungley v. Ungley*, L. R. 4 Ch. D. 73.

(t) See cases just cited, and see *dicta* in *Lacon v. Mertins*, 3 Atk. 4.

(u) See *supra*, and see *Wilber v. Paine*, 1 Hamm. 253.

(v) *Wilber v. Paine*, *supra*; *Hall v. Rowley*, 2 Root, 163.

(w) *Ackerman v. Fisher*, 57 Pa. St. 457; *Reed v. Reed*, 12 Pa. St. 117; *Wood v. Farmere*, 10 Watts, 195; *Parish v. Koons*, 1 Parsons' Eq. 89; *Gilday v. Watson*, 2 S. & R. 407; *Peifer*

if the agreement is not executory but substantially a transfer of the title.(x) Where the fact of taking possession has so altered the position of the vendee that he will be injured if the contract is not carried out, the part performance is, no doubt, sufficient.(y)

The effect of possession taken and maintained in creating a title to land by lapse of time has been considered under the civil law in Louisiana, and oral proof of such possession is admitted, as under the common-law system.(z) A verbal sale of land under the Spanish law is good if possession is taken and kept.(a) Formerly in California, possession without any writing was sufficient to give title in a mining claim.(b) But not since the act of April 13th, 1860.(c)

§ 579. In New Jersey the doctrine that the possession without more is sufficient, has been followed on authority but questioned on principle.(d) And it has been thought that the effect of possession as part performance is controlled by other circumstances.(e) Thus, where there were no improvements made, possession taken after the vendor's death was considered insufficient, principally because of the delay.(f) There is respectable authority for the denial of the all-sufficiency of mere possession as part performance.(g)

The arguments which have already been urged against regarding the reason of the rule of part performance being that of the protection of the party so performing against liability as a trespasser are equally available against treating mere possession as part performance. It has been said that mere possession of land

v. Landis, 1 Watts, 392; McFarland v. Hall, 3 id. 37; Christy v. Barnhart, 14 Pa. St. 260; Folmer v. Dale, 9 id. 83; Reynolds v. Hewett, 27 id. 176; Sage v. McGuire, 4 W. & S. 228; Billington v. Welch, 5 Binn. 129; Moes v. Culver, 64 Pa. St. 424; Moore v. Small, 19 id. 461.

(v) Garver v. McNulty, 39 Pa. St. 485.

(y) Capehart v. Hale, 6 W. Va. 550.

(z) Boudreau v. Boudreau, 12 Martin, 667.

(a) Riddle v. Ratliff, 8 Louisiana Annual, 108.

(b) Patterson v. Keystone Mining Co., 23 Cal. 576, citing cases.

(c) Stat. 1860, p. 175; King v. Randlett, 33 Cal. 321, Bl. & W. L. C. in Mines, p. 334 and n.

(d) Wallace v. Brown, 2 Stockt. 308.

(e) Waggoner v. Speck, 3 Ham. 292; see also Farley v. Stokes, 1 Pars. Eq. 428; Workman v. Guthrie, 29 Pa. St. 495.

(f) Kelly v. Sweeter, 17 Grant, Ch. 375.

(g) See the cases cited below; and Bright v. Bright, 41 Ill. 100 (a case of gift).

does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and property from the premises after such revocation. If possession be taken without such permission express or implied, it is no foundation for relief in equity according to any of the authorities. The argument for the admission of parol evidence to prove an agreement within the Statute of Frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defence either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no further than to deny the right of action to enforce such agreements.^(h)

So in New Jersey Chancellor Williamson said: "The reason given why mere possession, where the terms of the contract are clearly proved and the possession shown exclusively to refer to the contract, has been adjudged sufficient to take the case out of the statute appears to me very unsatisfactory. To determine any act a part performance it is essential that the act should be one prejudicial to the party seeking the benefit of it, for the principle upon which courts execute the contract is to prevent the commission of a fraud with impunity. The act of possession is said to be prejudicial in this way. The party in possession may be sued as a trespasser and for the profits of the land, and if he could not give the parol agreement in evidence he would be without protection. But it appears to me the propriety of permitting a party to defend himself by making the parol agreement admissible may well be admitted, without admitting the necessity, in order to prevent fraud, of permitting a party as an actor in court to enforce the specific performance of such an agreement. This matter, however, is settled by many well-adjudged authorities."⁽ⁱ⁾

In a Texan case even the authority for the commonly received rule is attacked, and the court, speaking of certain authorities, said: "We may say that we have found but one of them (*Butcher v. Stapley*, 1 Vern. 363) in which the performance of the contract was

(h) *Glass v. Hulbert*, 102 Mass. 33.

(i) *Wallace v. Brown*, 2 Stockt. 308.
See *King v. Morford*, Saxt. 280.

decreed at the instance of the purchaser on the bare fact of part performance by the delivery of possession, and even this case is so briefly reported as not to preclude all doubt whether there may not have been other facts and circumstances in it. We find, it is true, the same general rule which these authors lay down announced in some of the other cases, but they were suits most generally where the vendor was seeking the execution of the contract, or, if the purchaser was the plaintiff, there were other facts besides the mere delivery of possession which clearly authorized a decree.”(j)

The law now in Texas is settled to the effect that mere possession is not enough.(k) Even in Pennsylvania, where, as has been seen, the doctrine of the sufficiency of mere possession has been very positively laid down, there has been conflict of authority.(l) The plea that the notoriety of possession delivered atones for the want of written evidence is, it may be said, the revival in another form of the transfer of title to land by that livery of seisin which was intended to be abolished by the Statute of Frauds, and which by a judicial repeal of the latter is introduced again without the safeguards and restrictions which even at common law surrounded a conveyance *in pais*.

§ 580. It has been held that possession, to take a parol contract relating to land out of the Statute of Frauds, must even in equity be accompanied by improvements, or at least by payment of the whole or of part of the price.(m) In an early English chancery case it was said that “where a man, on promise of a lease to be made to him, lays out money in improvements, he shall oblige the lessor afterwards

(j) *Ann Berta Lodge v. Leverton*, 42 Tex. 25, reviewing the text-writers and citing and considering the following cases: *Kine v. Balfe*, 2 Ball & Beatty, 343; *Toole v. Medlicott*, 1 id. 393; *Boardman v. Mostyn*, 6 Ves. 467; *Lacon v. Mertins*, 3 Atk. 3; *Gunter v. Halsey*, 2 Ambl. 586; *Morphett v. Jones*, 1 Swanst. Ch. 172; *Clinan v. Cooke*, 1 Sch. & Lefr. 22; *Harris v. Crenshaw*, 3 Rand. 14; *Shepherd v. Shepherd*, 1 Md. Ch. Dec. 244; *Owings v. Baldwin*, 8 Gill, 337; *Morris v. Harris*, 9 Gill, 19; *Pugh v. Good*, 3 W. & S. 56; *Allen's*

Estate, 1 W. & S. 383; *Smith v. Smith*, 1 Rich. Eq. 130; *Keatts v. Rector*, 1 Ark. 391.

(k) *Hibbert v. Aylott*, 52 Tex. 533.

(l) See *Stewart v. Stewart*, 3 Watts, 255; *Galbreath v. Galbreath*, 5 Watts, 150 (saying that loss of possession could be compensated in damages); *Van Loon v. Davenport*, 1 W. N. Cas. 320; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. Cas. 376 (citing cases); *Ballard v. Ward*, 89 Pa. St. 362 (the case of a gift).

(m) See the following cases, where the payment was a conspicuous feature of

to execute the lease, because it was executed on the part of the lessee; besides, that the lessor shall not take advantage of his own fraud to run away with the improvements made by another; but if no such expense had been on the lessee's part, a bare promise of the lease, though accompanied with possession, as where a lessee by parol agreed to take a lease for a term of years certain, and continued in possession on the credit thereof, yet there being no writing to make out this agreement, it is directly within the statute, and so was held by the Master of the Rolls, in the case of *Smith and Turner, Michaelmas last, at the Rolls.*"(n) In Alabama the point is settled by a statute(o) which requires that the purchaser be put into possession, and that part at least of the purchase-money be paid.(p)

§ 581. The delivery of a deed unstamped for part of the land, and afterwards of a deed stamped, possession and full payment, are sufficient part performance of a contract for the whole of the land.(q) Possession taken of a brewery is sufficient, though the contract was for the "brewery and premises;" the property being entire.(r) Where the defendant admitted the possession of and payment for part of the tract in suit, specific performance of so much of the contract as related to that part was decreed.(s)

Sufficient part performance; delivery of part of land; delivery of possession generally.

In a case where there were two parcels of land, it seems that possession taken of one was sufficient.(t) And this has been decided

the part performance: *Purcell v. Miner*, 4 Wall. 513; *Byrd v. Odem*, 9 Ala. 765; *Brewer v. Brewer*, 19 Ala. 488; *Thornton v. Henry*, 2 Scamm. 218; *Udike v. Armstrong*, 4 Ill. 585; *Shirley v. Spencer*, 4 Gilm. 600; *Ramsey v. Liston*, 25 Ill. 114; *Fitzsimmons v. Allen*, 39 Ill. 440; *Bright v. Bright*, 41 Ill. 97; *Tibbs v. Barker*, 1 Blackf. 58; *Fairbrother v. Shaw*, 4 Ia. 570; *Chamberlin v. Robertson*, 31 Ia. 408; *Letcher v. Cosby*, 2 A. K. Marsh. 106; *Harrison v. Harrison*, 1 Md. Ch. Dec. 331; *Drury v. Conner*, 6 Harr. & J. 288; *Ashmore v. Evans*, 3 Stockt. 151; *Reynolds v. Dunkirk R. R.*, 17 Barb. 613; *Traphagen v. Traphagen*, 40 Barb. 537; *Merithew v. Andrews*, 44 Barb. 200; *Bassler v. Niesly*, 2 S. & R. 352; *Gilday v. Watson*, 2 id. 407;

Stewart v. Stewart, 3 Watta, 255; *Lowry v. Mehaffy*, 10 Watta, 387; *Williams v. Landsman*, 8 W. & S. 55; *Calhoun v. Hays*, Id. 131; *Parish v. Koons*, 1 Pars. Eq. 89; *Pike v. Morey*, 32 Vt. 37; *Payne v. Graves*, 5 Leigh, 561; *Blanchard v. McDougal*, 6 Wis. 167.

(n) *Smith v. Turner*, cited in *Seagood v. Meale*, Prec. Ch. 561.

(o) Rev. Code 1867, § 1862, subs. 6.

(p) *Carroll v. Powell*, 48 Ala. 301.

(q) *Jones v. Pease*, 21 Wis. 653. See *Ann Berta Lodge v. Leverton*, 42 Tex. 24.

(r) *Cameron v. Spiking*, 25 Grant, Ch. 117.

(s) *Graham v. Yeates*, 6 Harr. & J. 229.

(t) *Smith v. Underdunk*, 1 Sandf. Ch. 580; but see *Buckmaster v. Harrop*, 7 Ves. 344.

in Wisconsin, the court saying: "And we do not think, when a party agrees by parol to convey different parcels of land, that possession of each parcel under the contract is necessary to take it out of the statute. If it is, then possession may be given of the most valuable portion of the lands, and the purchase-money all be paid, and yet the purchaser be turned out of possession of the very lands he has taken possession of under the contract, by an action of ejectment; and compelled to pay for their use and occupation, and be left to an action at law to recover the purchase-money paid."^(u) See, however, § 584. Payment of rent and attornment by the vendor's tenant to the vendee constitute sufficient delivery of possession, together with payment of the purchase-money.^(v)

Where the plaintiff, a mechanic, was to take a house in payment of his bill and the defendant settled with him on that basis; and the plaintiff received an order from the defendant on the tenant to pay the former the rent, and collected the rent for several months, the part performance as by possession and payment is sufficient.^(w) Where a father bought tract B. with money of his son, and agreed that this amount should go into tract H., which was delivered to the son, who gave notice to the tenant of tract B. to pay the rent to the father, and the assessments were changed and the son kept possession of tract H., the part performance was held to be sufficient.^(x) Where one authorized by the vendor to deliver possession to the vendee takes a lease of the land from the vendee and enters into actual possession, there is an equitable estate in the vendee lessor.^(y) Change of residence, possession taken, and improvements made, are sufficient part performance.^(z)

Where the vendor put tenants into the possession of the land sold, declaring that the latter belonged to the vendee and that the tenants must take care of it for the vendee, it is a circumstance of part performance, and the fact that the vendee left the property does not, under the circumstances, imply an abandonment either of the property or of the contract.^(a) A promise by the owner of land to build a shop thereon and lease it is sufficiently part-per-

(u) *Jones v. Pease*, 21 Wis. 653 (citing *Smith v. Underdunk*). See *Jenness v. Wendell*, 51 N. H. 63 (a case of chattels).

(v) *Williams v. Laudman*, 8 W. & S. 55.

(w) *Bechtel v. Cone*, 52 Md. 706.

(x) *Lee v. Lee*, 9 Pa. St. 169.

(y) *Pugh v. Good*, 1 W. & S. 58.

(z) *Mims v. Lockett*, 33 Ga. 9.

(a) *Vickers v. Sisson*, 10 W. Va. 18.

formed by building the shop and giving possession; rent being paid by the lessee until dispossessed.(b) Evidence of possession taken is admissible to show the nature of the claim asserted.(c) Possession may be sufficient part performance of an oral contract relating to a right of way.(d)

§ 582. As we have already seen, leases may be taken out of the Statute of Frauds by part performance; and possession may be such part performance,(e) especially where rent is paid and accepted under the lease.(f) Possession delivered of one of the tracts of land is sufficient in the case of an exchange.(g) It is certainly an element of the part performance, even *quoad* the other tract.(h)

The rule applied to leases; exchange.

Where there was an agreement to exchange a share in a mining right in one tract for a similar share in another, so that all the land should be held together on shares, the analogy of an exchange was followed, and a conveyance by the plaintiff of his right was considered sufficient part performance.(i) Where one party to a parol exchange part performed by buying the land he was to give, a preliminary injunction was issued to stop the sale of his land by the other party to a third person.(j) Immediate possession is not essential in the case of a parol exchange; greater latitude being allowed than in the case of a sale.(k) And if one party has received his land he is not entitled to hold both, because he has not given or could not give immediate possession of that which he had

(b) *Eaton v. Whitaker*, 16 Conn. 229.

(c) *Union Canal Co. v. Loyd*, 4 W. & S. 400.

(d) *Puttman v. Haltey*, 24 Ia. 425; *Pettibone v. Lacrosse R. R.*, 14 Wis. 446.

(e) *Hodges v. Howard*, 5 R. I. 158; *Simmons v. Simmons*, 12 Jur. 8; 6 Hare, 352; *Wiley's Estate*, 6 W. N. Cas. 208; *Weddall v. Capes*, 1 M. & W. 50; (*County of*) *Huron v. Kerr*, 3 Grant, Ch. 267.

(f) *Grant v. Ramsey*, 7 Ohio St. 167; *Butler v. Powis*, 2 Coll. 161; *Wiley's Estate*, 6 W. N. Cas. 208.

(g) *Caldwell v. Carrington*, 9 Peters, 86, as to the law of Virginia, and saying that the rule was otherwise in Ken-

tucky; *Moss v. Culver*, 64 Pa. St. 424; *Gordonier v. Billings*, 77 Pa. St. 501; *Dock v. Hart*, 7 W. & S. 174; *Parrill v. McKinley*, 9 Gratt. 1; *Baldwin v. Thompson*, 15 Ia. 504; *Devin v. Himer*, 29 Ia. 299; *Fitzsimmons v. Allen*, 39 Ill. 440; *Wilkinson v. Wilkinson*, 1 Des. Ch. 201; *Beebe v. Dowd*, 22 Barb. 258; *Armes v. Bigelow*, 3 McArthur, 443 (S. C. Col.)

(h) *Moss v. Culver*, 64 Pa. St. 424.

(i) *Sweeney v. O'Hara*, 43 Ia. 36.

(j) *Curtis v. (Marquis of) Buckingham*, 3 V. & B. 168.

(k) *Thompson v. Gould*, 20 Pick. 138; *Miles v. Miles*, 8 W. & S. 136; *Reynolds v. Hewett*, 27 Pa. St. 176.

contracted to convey.^(l) Indeed the evidence of the entire transaction has in some cases been liberally regarded, and it has been said: "A sale is confined to a subject coming from a single side; but if the evidence of an exchange shows a clear, unequivocal, and complete taking possession of one of the subjects of the exchange by the party owning the other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject; evidence of possession that might seem weak and inconclusive in the case of a parol sale is thus made clear and convincing in the case of an exchange."^(m)

Delivery of possession by each contracting party under an exchange of land is sufficient part performance, though one of the parties got his title while the other did not, and though in absence of the latter his family were caused by the former to move off the property.⁽ⁿ⁾ Where possession is delivered under an oral contract between vendor and vendee rescinding the former sale, the part performance may be sufficient.^(o)

§ 583. A parol partition with separate possession and improvements is sufficient, and this though only one party improves.^(p)

There is a current of authority in Pennsylvania which runs in opposition to oral contracts between co-tenants being made valid

(l) *Miles v. Miles*, 8 W. & S. 136.

(m) *Moss v. Culver*, 64 Pa. St. 424, citing cases.

(n) *Fitzsimmons v. Allen*, 39 Ill. 440.

(o) *Arrington v. Porter*, 47 Ala. 721.

(p) *Cummins v. Nutt*, *Wright* (Ohio), 713; an interesting case of a partly performed partition is that of *Williams v. Williams*, 2 Dr. & Sm. 378, L. R. 2 Ch. App. 294 and 305, where two brothers, their father's will devising his property equally being invalid for want of certain formalities, became equally entitled to part which was in gavelkind, the elder, John, exclusively to another portion being in socage, and the younger, Samuel, to another portion being borough-English tenure; and they agreed by parol to hold it all in common, which they did for a long time, the rents being paid into a joint

bank account, &c., part of the property being lived in by them together with the father's widow, who did not assert any right of hers against the arrangement. It was held that the performance of the contract took it out of the Statute of Frauds, and that both brothers and widow were mutually bound by it; there was consideration on Samuel's part in his giving up his rights in the borough-English, though these were of comparatively trifling value, and, *semble*, that as a family arrangement it would under any circumstances have been upheld. In S. C. below, 2 Dr. & Sm. 379, the Statute of Frauds does not appear to have been set up. The Vice-Chancellor said that every conceivable act by which joint ownership could be shown was evidenced in this case.

by part performance; and it has been held that a sale by one such tenant to another cannot be made by parol, because possession under the contract is alike essential and impossible.(q) And where two buy together it has been held that one who is to have an undivided moiety cannot take as against the other such possession as will constitute part performance.(r) A less rigid rule was laid down when it was said that such part performance is impossible unless one co-tenant gives up possession.(s)

The theory that co-tenants cannot establish part performance as between themselves has been referred to with approval in Kansas.(t) A parol partition, however, which involves a separation of possession, is generally sufficient when partly performed.(u) It has been said that the title must be distinct and the object of the partition only to separate the possession, as tenancy in common, for instance, consists only of unity of possession.(v)

Where the buyer of land agrees that it shall be conveyed to another under an oral agreement that the two so divide it, and the division is made and possession taken, the Statute of Frauds does not apply.(w) A contract between the parties to an ejectment by which judgment shall be entered for the plaintiff, but shall be restricted to a particular tract, is not a contract for the sale of land, but is a parol partition, and with occupation thereunder in severalty is good, the title to the particular tract being ceded.(x)

An agreement to divide land being made, a surrender of part to conform to the new division to be made upon payment is, however, no surrender if the division is not completed and the money paid.(y)

Under a parol partition partly performed, the boundary must be settled(z) and possession thereon taken(a) and maintained.(b) Where the above requisites concur, a parol partition will be sustained in

(q) *Hill v. Myers*, 43 Pa. St. 172; *Spencer's Appeal*, 80 Pa. St. 330, citing cases.

(r) *Chadwick v. Felt*, 35 Pa. St. 306.

(s) *Workman v. Guthrie*, 29 Pa. St. 495.

(t) *Nay v. Mograin*, 24 Kan. 78.

(u) See *supra*; and see *Cusey v. Hall*, 81 Ill. 160.

(v) *Jackson v. Bradt*, 2 Cal. 174.

(w) *Rhine v. Robinson*, 27 Pa. St. 34.

(z) (*City of*) *Natchez v. Vandevelder*, 31 Miss. 719.

(y) *Weddall v. Capes*, 1 M. & W. 50.

(a) *Haughabaugh v. Honald*, 1 Const. 90.

(b) *Id.*; *Ebert v. Wood*, 1 Binn. 216.

(c) *Haughabaugh v. Honald*, 1 Const. 90; *Goodhue v. Barnwell, Rice*, Eq. 198.

equity.(c) A parol partition between co-parceners is good when executed by possession.(d)

Besides the examples already of the denial of the validity of parol partition part performed, one or two more may be given before leaving the subject. Thus a parol partition by metes and bounds by tenants in common, there being a conveyance by each to a third person and possession taken for a number of years, was held not to bind,(e) and so a partition by joint tenants, though there was a subsequent occupancy.(f) So where directions were given to draw deeds, and the parties went upon the land with an artist to have a plan of the partition made, and one party withdrew from the rest of the land and claimed exclusive possession of his own, the part performance was insufficient.(g)

§ 584. Where there is a parol compromise of conflicting titles, a division of the land by a referee, the parties being present, the delivery of possession of one of the portions and the making of improvements constitute sufficient part performance.(h) So an executed contract as to boundary line one of the parties going to expense under the agreement.(i) Possession taken is enough.(j) Possession, improvements, and permanent location of a division line are certainly sufficient(k) even as against an assignee of either part.(l) Boundaries not definite at the time of the contract, but reasonably so at the time of suit, are sufficiently fixed.(m) Where the lines are so shown that they can be run by the surveyor, it is sufficient part performance.(n) Even where the boundary was not in dispute, an adjustment by parol of a new line not the true one is valid, when possession has been kept thereunder for thirty years, and there have been two processions.(o)

- (c) *Ireland v. Rittle*, 1 Atk. 541. (k) *Laverty v. Moore*, 32 Barb. 351; 33 N. Y. 662; *McLain v. School Directors*, 51 Pa. St. 196; see a curious application of this rule, *Turner v. Baker*, 64 Mo. 218.
- (d) *Willey v. Bonney*, 31 Miss. 644. (l) *Kincaid v. Downey*, 47 Mo. 340; *Houston v. Sneed*, 15 Tex. 308.
- (e) *Duncan v. Sylvester*, 16 Me. 388. (m) *McLain v. The School Directors*, 51 Pa. St. 196.
- (f) *Porter v. Hill*, 9 Mass. 34. (n) *Burns v. Sutherland*, 7 Pa. St. 103.
- (g) *Gratz v. Gratz*, 4 Rawle, 433; and on the subject of parol partition, see partition. (o) *Harris v. Crenshaw*, 3 Rand. 14.
- (h) *Weed v. Terry*, 2 Doug. (Mich.) 350.
- (i) *Schwendeman v. Hoevler*, 13 Pitts. L. J. 194.
- (j) *Kellogg v. Smith*, 7 Cush. 380, citing authorities pro and contra.

Where there was a claim for one hundred and forty-five acres, one hundred acres under a gift and forty-five under a sale, if the evidence was otherwise satisfactory of these parol transactions, the absence of evidence to show a division line between the above tracts is not fatal.(p) A verbal sale of a pre-emption right is good, if followed by actual occupation of the improvements thereunder.(q) "In mining claims," said the court in a California case, "we require no other acts as evidence of possession than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to cultivate the ground nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. * * Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on a part, and though the party does not enter in accordance with mining rules."(r) As to the definition of the boundary line by the parties, see *supra*.

Possession of two several tracts and payment therefor is insufficient part performance as to the rest.(s) And that delivery of part of a tract is sufficient, has been denied; so where the donee, under a parol gift of a lot of land, entered into possession and took a deed afterwards of a portion only, and this was inclosed by a fence run, it was held that the evidence would not support specific performance for the whole lot, though there was evidence of some use of the rest of the lot by the alleged donees;(t) and possession under a deed describing the land is insufficient part performance of an oral contract for another and a larger tract.(u) Of these four cases the two latter may probably be reconciled with what has been heretofore said as to the effect as part performance of delivery of part of the land sold, but scarcely the two former.

As a few examples of possession being insufficient part performance of a gift, the following may serve. Possession by a son

(p) *Aurand v. Wilt*, 9 Pa. St. 55; see *Stranahan*, 20 Cal. 208; see *Copper Hill Zimmerman v. Wengert*, 31 Pa. St. 404. &c. Co. v. Spencer, 25 Cal. 24.

As to this subject see "Land."

(q) *Bledsoe v. Cains*, 10 Tex. 460.

(s) *Meredith v. Naish*, 4 St. & Port. 59.

(t) *Wiener v. Stephani*, 45 Mo. 565.

(r) *Table Mountain Tunnel Co. v.*

(u) *Glass v. Hulbert*, 102 Mass. 24.

under an oral gift, taxation in his own name, and improvement merely necessary for the use of the land, have been held insufficient.(v) For possession and even improvements by a son of his father's land is sufficiently accounted for by their relationship, and does not evidence of itself a sale or a gift.(w) Where a son under a parol contract with his father relating to land moved upon the land with his family, remained a few days and then went away, it was insufficient part performance.(x)

Where a claimant lived upon the land in suit as a servant of the defendant, being adopted by the latter, with whom he lived from the age of eighteen months to that of twelve years, there was no such part performance by possession as would oust the Statute of Frauds.(y) Tender of a deed and of possession are not sufficient part performance; both being refused.(z) The use of a vacant lot adjoining the vendee's warehouse, for storage of articles, is insufficient part performance.(a) Turning water from an adjoining building upon the land is not sufficient possession.(b) Buying out a tenant in possession and putting another into possession for a few weeks is insufficient.(c)

§ 585. Continuance in possession taken before the contract was made which is sought to be enforced, is not usually sufficient part performance of the latter.(d) There

(v) *Cox v. Cox*, 26 Pa. St. 381; see *Shellhammer v. Ashbaugh*, 83 Pa. St. 28.

(w) *Jones v. Tyler*, 6 Mich. 368; see *Pinckard v. Pinckard*, 23 Ala. 649; *Cronk v. Trumble*, 66 Ill. 432; *Willey v. Day*, 51 Pa. St. 56.

(x) *Black v. Black*, 2 Grant, Err. & App. (U. C.) 424, reversing S. C. below, 9 Grant, Ch. 403.

(y) *Cuddy v. Brown*, 78 Ill. 420.

(z) *Conway v. Sherron*, 2 Cranch (C. C.), 80; *Reeves v. Pye*, 1 Cranch, C. C. 219.

(a) *Poland v. O'Connor*, 1 Neb. 50.

(b) *Tanner v. Valentine*, 75 Ill. 628.

(c) *White v. Watkins*, 23 Mo. 426. See *supra*.

(d) *Wills v. Stradling*, 3 Ves. Jr. 381; *Morphett v. Jones*, 1 Swanst. 181; *Re*

Nat. Savings Bk. Ass., Bradley's Case, 15 W. R. 753; *Lincoln v. Wright*, 4 DeG. & J. 20; *Moore v. Crofton*, 3 Jones & Lat. 444; *Orpen v. Moore*, 2 Jones (Ir.), 442; *O'Rourke v. Percival*, 2 Ball & B. 61; *Danforth v. Laney*, 28 Ala. 278; *Baker v. Hollobaugh*, 15 Ark. 327; *Carlisle v. Fleming*, 1 Harrington, 431-2; *Wood v. Thornly*, 58 Ill. 466; *Padfield v. Padfield*, 92 Ill. 203; *Johnston v. Glancy*, 4 Blackf. 94; *Johns v. Johns*, 67 Ind. 443; *Rucker v. Steelman*, 73 Ind. 400; *Mahana v. Blunt*, 20 Ia. 142; *Edwards v. Fry*, 9 Kans. 422; *Cornellison v. Cornellison*, 1 Bush, 151; *Howard v. Carpenter*, 11 Md. 276; *Rosenthal v. Freeburger*, 26 Md. 75; *Semmes v. Worthington*, 38 Md. 317; *Wentworth v. Wentworth*, 2 Minn. 283; *Cole v. Potts*, 2 Stockt. Chanc. 67; *Morrill v. Cooper*,

must be but one contract to which to refer the part performance.(e) Where the only alleged change of possession was that the plaintiff claimed to withdraw from the management of the partnership business, leaving the defendant alone in possession of the property and business, this does not show that the defendant has taken and held possession under and by virtue of the contract, so as to make the parol evidence competent under the Statute of Frauds, or take the case out of the statute. The possession must unequivocally refer to and result from the agreement. Here the defendant merely continued in possession. The case is not unlike a sale to a tenant, in which the continued possession by the tenant has been held insufficient.(f) Where the previous holding, as is generally the case, is under a lease, the rule is all the stronger, for a tenant of course continues in possession unless there is a notice to quit, and therefore such continuance is presumptively referable to the lease.(g) In a modern English case, besides other reasons, *Kindersley, V. C.*, refused to give a decree to compel one who had taken possession under a parol contract of lease to pay rent because the lease was not to begin till house was finished, and the tenant took possession before this was done.(h) Though there are payment and improvements if the only possession is one continued over, the part performance is insufficient.(i) This rule is not of universal application.(j)

65 Barb. 516; *Ryan v. Dox*, 34 N. Y. 313; *Armstrong v. Kattenhorn*, 11 Ohio, 265; *Crawford v. Wick*, 18 Ohio St. 190, citing *Armstrong v. Kattenhorn*; *Brown v. Lord*, 7 Or. 309; *Jones v. Peterman*, 3 S. & R. 542; *Farley v. Stokes*, 1 Pars. Eq. Cases, 422; *Cravener v. Bowser*, 4 Pa. St. 259; *Aitkin v. Young*, 12 id. 15; *Christy v. Barnhart*, 14 id. 260; *Greenlee v. Greenlee*, 22 id. 237; *Hill v. Myers*, 43 id. 172; *Myers v. Byerly*, 45 id. 368; *Clark v. Trindle*, 52 id. 492; *Smith v. Smith*, 1 Rich. Eq. 134; *Poag v. Sandifer*, 5 Rich. Eq. 170; *Hatcher v. Hatcher*, 1 McMullin, Eq. 311; *Walker v. Aicklin*, 2 Munf. 359; *Blanchard v. McDougal*, 6 Wis. 167; *Bowen v. Warner*, 1 Pinney, 605. See *Story's Equity Jur.* (12th edition), § 763 (a).

(e) *Brennan v. Bolton*, 2 Dr. & W. 354.

(f) *Wilmer v. Farris*, 40 Ia. 310.

(g) *Place v. Johnson*, 20 Minn. 220, relying greatly upon *Lincoln v. Wright*, 4 DeG. & J. 16; see *Spaulding v. Conzelman*, 30 Mo. 182, citing *Morphett v. Jones* and other cases; *Cornellison v. Cornellison*, 1 Bush, 151; *Newnan v. Carroll*, 3 Yerg. 26; *Johnston v. Glancy*, 4 Blackf. 98 (citing *Wills v. Stradling*; *Savage v. Carroll*, 1 Ball & B. 265, and *Anthony v. Leftwich*, 3 Rand. 238).

(h) *Faulkner v. Llewellyn*, 31 L. J. Ch. 550.

(i) *Eargood's Estate*, 1 Pearson, 400; *Whiting v. Pittsburg Opera Co.*, 88 Pa. St. 101; see contra, *Pfiffner v. Stillwater R. R.*, 23 Minn. 344; *Ewing v. Gordon*, 49 N. H. 458.

(j) *Aurand v. Wilt*, 9 Pa. St. 54;

If one continuing over in possession can prove the latter to be under the contract, though this may be difficult, it is sufficient part performance.^(k) Thus where one party held over after the death of the other, the part performance was, it seems, sufficient.^(l) Where a proposed tenant's terms were reduced to writing and were submitted to the lessor, who, without objection, let the tenant into possession and directed a lease to be drawn in accordance with the draft, the part performance was sufficient, as this was a possession under the contract and not a mere continuance over.^(m) Where one who has wrongfully taken possession under a prior invalid contract continues in possession and improves under a new contract sought to be enforced, it is enough.⁽ⁿ⁾

Where one continuing in possession improves, the improvements may be taken alone as sufficient part performance.^(o) In a Maryland case, *Mills*, a tenant for life in possession, bought the reversion from Conner, and it was held that *Mills* remaining in possession was sufficient part performance under the circumstances, though the change of possession seems only to have been evidenced by declarations of the parties; though Conner resisted specific performance when sued by *Mills*. *Mills'* representative seemed to have kept possession, but who died first, *Mills* or Conner, does not appear.^(p) And where possession was kept by the holder of the legal title with a written release of all claims which was given by the holder of the equitable title, and which was defective under the Statute of Frauds, it has been held sufficient part performance to take the contract for the sale of the equitable title out of the Statute of Frauds, though the possession was before the release and no new possession was taken.^(q)

A., being tenant at will of a tract belonging to B., A. and B. agreed upon an exchange of this land for other land belonging to A. A. put valuable improvements on the tract of which he had

Moss v. Culver, 64 Pa. St. 425; *Wilde v. Fox*, 1 Rand. 167.

^(k) *Edwards v. Fry*, 9 Kan. 423.

^(l) *Lincoln v. Wright*, 4 DeG. & J. 20.

^(m) *Pain v. Coombs*, 1 DeG. & J. 47.

⁽ⁿ⁾ *Jennings v. Robertson*, 3 Grant, Ch. 517.

^(o) *Wills v. Stradling*, 3 Ves. Jr. 381; *Mundy v. Jolliffe*, 5 Myl. & Cr. 173;

Shillibeer v. Jarvis, 8 DeG. M. & G. 81; *Pfiffner v. Stillwater R. R.*, 23 Minn.

344; *Ewing v. Gordon*, 49 N. H. 458;

Tate v. Jones, 16 Flor. 239; see contra, *Eargood's Estate*, 1 Pearson, 400.

^(p) *Drury v. Conner*, 6 H. & Johns. 291.

^(q) *Grunley v. Webb*, 48 Mo. 571.

possession, and B. took possession of A.'s tract and sold a portion of it; and the court held that the prior tenancy was not conclusive evidence of the nature of the possession.(r)

In an Indiana case the court were equally divided on the question whether possession and improvements made by one claiming under a parol sale are sufficient part performance, when he had been previous to the sale in possession as owner.(s) In an early Kentucky case, where the plaintiff took under a lease with a privilege of purchase, and improved, the improvements were considered as insufficient; but no point was made as to the possession under the lease affecting the contract of sale.(t) In a Vermont decision there is a *dictum* to the effect that continued possession by a tenant after the expiration of his lease without any demand of rent, together with improvements made of which the vendor had knowledge and to which he made no objection, were sufficient part performance.(u)

§ 586. A tenant previously in possession can perform under the new contract by distinctly giving up the land and taking fresh possession,(v) and the burden is on the tenant to disconnect the two possessions.(w) Where one party claims to possess under a contract and the other asserts the possession to have been under a tenancy, the former must affirmatively make out his case.(x)

The holder of former possession may surrender it and take new possession; payment of higher rent.

In a Wisconsin case it was suggested that where it was agreed that the tenancy should end and the possession be that of a purchaser, the continuance in possession might be sufficient part performance.(y) It seems also that the payment of higher rent under the new lease will take the case out of the Statute of Frauds, though the tenant had held over after the expiration of a previous

(r) *Moss v. Culver*, 64 Pa. St. 424, citing *Aurand v. Wilt* and other cases. In *Aurand v. Wilt*, 9 Pa. St. 55, the tenant ceased to pay rent, paid part of price, improved the land, and had the property assessed in his name, and the part performance was sufficient.

(s) *Pearson v. East*, 36 Ind. 29.

(t) *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346.

(u) *Ewing v. Gordon*, 49 N. H. 458.

(v) *Cole v. Potts*, 2 Stöckl. 68; *East-*

burn v. Wheeler, 23 Ind. 307; *Hays v. Clement*, cited in *Stewart N. J. Dig.* vol. I., p. 583; and see the *Alabama*, *Indiana*, *Iowa*, *Kansas*, *Maryland*, *New Jersey*, *Ohio*, *Pennsylvania*, *South Carolina* and *Wisconsin* cases cited § 585 n. (d).

(w) See the cases just cited and referred to.

(z) *Danforth v. Laney*, 28 Ala. 278.

(y) *Blanchard v. McDougal*, 6 Wis. 170.

parol one;(z) and this was so decided in a Canada case.(a) In a Scotch case it was held that the acceptance of less rent than is called for by a written lease will not, without more, admit oral evidence of a change in the contract on the ground of *rei interventus* or part performance.(b)

A tenant claiming under a new lease and who continued in possession sought to make out his case by part performance. The court sustained his contention, saying that a majority of this court think the allegation of the complainant "that he paid the rent, \$1500, for the last year as part and parcel of the agreement aforesaid, and in performance and consideration thereof, and not otherwise," equivalent to an averment "that the landlord accepted the additional rent upon the foot of the agreement," which was held sufficient in 3 Ves. Jr. 378 to require an answer.(c) But the payment of additional rent has on the other hand been regarded as not of much consequence.(d)

§ 587. Where a vendee was in possession of part of the land in dispute and the vendor gave up possession of the residue, and gave a writing authorizing the vendee to keep possession and rent the property, the part performance was sufficient.(e) The broad statement has sometimes been made that between landlord and tenant part performance was impossible.(f) Repairs under an old lease in expectation of a new one are not sufficient part performance.(g) It seems that the relinquishment by a widow of part of her husband's land, followed by possession of the remainder as a dower tract, is not adequate part performance of a parol assignment of the latter as dower.(h)

Where a railroad under its location acquired a right to land be-

(s) Archbold v. Lord Howth, 1 Ir. Rep. C. L. 619; 18 Ir. Jur. 88; Desart (Lord) v. Goddard, Wallis' Rep. (by Lyne), 357; especially with improvements; see Wills v. Stradling, 3 Ves. Jr. 381; Nunn v. Fabian, 35 L. J. Ch. 141, L. R. 1 Ch. App. 35.

(a) Butler v. Church, 18 Grant, Ch. 192; 16 id. 205.

(b) Kirkpatrick v. Allanshaw Coal Co., 18 Scotch Law Reporter, 212.

(c) Spear v. Orendorf, 26 Md. 45.

(d) Spalding v. Conzleman, 30 Mo. 182.

(e) Merithew v. Andrews, 44 Barb. 200.

(f) Workman v. Guthrie, 29 Pa. St. 495; Smith v. Spencer, 2 W. N. C. 518, citing cases.

(g) Byrne v. Romaine, 2 Edw. Ch. 445.

(h) Leach v. Shaw, 8 Grant, Ch. 497.

longing to the plaintiff but never took possession, the fact that the plaintiff remained in possession is not part performance of an oral promise by the railroad to give up this land if the plaintiff would not claim damages for other land of his taken by the same railroad.(i) Possession by the son of a life tenant with power to sell the reversion, and ordinary repairs by the son, make no sufficient part performance of a contract by the life tenant to sell the son the reversion.(j) A debtor whose land was sold at sheriff's sale remained in possession, and having paid to the defendant rent under a new agreement by which the defendant became purchaser of the land at sheriff's sale, the court seemed to have regarded the part performance as sufficient.(k)

Another example of continuance in possession supported as sufficient part performance is given in the following case: The defendant in ejectment was in possession of the land for the purpose of making improvements in order to gain a pre-emption right; he agreed with the plaintiff's ancestor that the latter should "enter" (i. e. take the regular steps to get title from the United States), and upon repayment of a certain sum should reconvey to the defendant who remained in possession, improved, and paid the purchase-money.(l) It has been said, however, that an oral agreement contemporaneous with the conveyance that the grantor should have possession, is partly performed by such grantor remaining in possession.(m) Where an execution debtor had been living on the land sold under the execution for a long time previously, and the sheriff's vendee bought the land with his own money, no constructive trust can be set up, though the execution debtor refunded to the sheriff's vendee the price which the latter had paid.(n) Where a *cestui que trust* orally sold his interest in certain land to one of the trustees, there is no such change of possession as will be sufficient part performance if the trustee continue to hold the land in the same way in which he had been doing.(o)

§ 588. Making valuable improvements for which the use of the land is not an adequate return, and which cannot be compensated

(i) *Barnes v. Boston &c. R. R.*, 130 Mass. 389.

(l) *Fisher v. Moolick*, 13 Wis. 321.

(j) *German v. Machin*, 6 Paige, Ch. 288.

(m) *Carpenter v. Carpenter*, 8 Bush,

293.

(n) *Graves v. Dugan*, 6 Dana, 337.

(k) *Wilde v. Fox*, 1 Rand. 167.

(o) *Smith v. Spencer*, 2 W. N. C. 518.

Improvements good part performance; what is requisite; examples. for in damages, is a strong circumstance of part performance.(p) And, as has been said, the fact of possession with the making of improvements is sufficient,(q) and the improvements may be sufficient of themselves when the possession is not of a satisfactory character.(r) But it has been said that payment, possession taken, and improvements made were all necessary to constitute part performance.(s) The improvements must be permanent and of value.(t) There is no precise rule as to what improvements are necessary.(u)

Slight improvements, such as removing an old storehouse and cultivating the land, may be enough if permanent and such as would be done only by an owner.(v) Improvements must be explainable only on the theory of the alleged contract.(w) Like all other part performances, the improvements must be with the assent of the owner.(x) Improvements are effectual as part performance in the case of conflicting titles,(y) or in the case of a gift.(z)

An oral contract of lease is taken out of the Statute of Frauds by improvements made,(a) or of the subsequent alteration of a written contract, money being spent upon the land the subject of the new oral contract and in reliance upon the latter.(b) Cultivation of the land in dispute is enough,(c) even if the farming was

(p) *Pfiffner v. Stillwater R. R. Co.*, 23 Minn. 344; *Lobdell v. Lobdell*, 36 N. Y. 331; *Finucane v. Kearney*, 1 Freem. Ch. 68; *Hawkins v. Hunt*, 14 Ill. 43; *Hill v. Myers*, 43 Pa. St. 172; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. C. 376; *Bissell v. Harrington*, 18 Hun, 84; *Shobe v. Carr*, 3 Munf. 10.

(q) *McCarger v. Rood*, 47 Cal. 141; *Lafollett v. Kyle*, 51 Ind. 449; *Atkinson v. Jackson*, 8 Ind. 33. This is especially so when there is a change of residence, *Mims v. Lockett*, 33 Ga. 9.

(r) *Pfiffner v. Stillwater R. R.*, 23 Minn. 344; *Shillibeer v. Jarvis*, 8 DeG. M. & G. 51.

(s) *Updike v. Armstrong*, 4 Ill. 565.

(t) *Porter v. Allen*, 54 Ga. 624; *Peckham v. Barker*, 8 R. I. 17; *Wood v. Thornly*, 58 Ill. 486; *Hollis v. Whiteing*, 1 Vern. 151; *Wheeler v. D'Esterre*, 2 Dow, 359; *Toole v. Medicott*, 1 Ball &

B. 401; *Howe v. Hall*, Ir. Rep. 4 Eq. 252; *Tate v. Jones*, 16 Flor. 239.

(u) *Tate v. Jones*.

(v) *Porter v. Allen*, 54 Ga. 624.

(w) *Spalding v. Conzelman*, 30 Mo. 182.

(z) *Lyles v. Lyles*, Harper, 288; *McCoy v. Hughes*, 1 G. Green (Ia.), 370.

(y) *Tatum v. Brooker*, 51 Mo. 148.

(a) *Porter v. Allen*, 54 Ga. 624; *McLain v. School Directors*, 51 Pa. St. 196; *Beaver v. Filson*, 8 Pa. St. 334.

(b) *Clark v. City of Cincinnati*, 1 West. Law Jour. 53; see *Seaman v. Aschermann*, 51 Wis. 682.

(c) *Anon.*, 5 Vin. Abr. 522, pl. 38.

(d) *Porter v. Allen*, 54 Ga. 624; *Conway v. Sherron*, 2 Cranch, C. C. 80; *Dugan v. Colville*, 8 Tex. 126; *Wilkinson v. Wilkinson*, 1 Des. Ch. 201; *Rutherford v. Sargent*, 71 Ill. 342; *Like v. McKinstry*, 4 Keyes, 408; *Burn v. Strong*, 14 Grant, Ch. 657.

not judiciously done.(d) Taking of possession, clearing, fencing, and raising a crop, make sufficient part performance.(e) Plowing may be sufficient part performance.(f) So setting out strawberries at the vendor's suggestion upon land orally bought for that purpose.(g) Erecting buildings is sufficient.(h)

Where the claimant removed old buildings first occupied by him under a lease and erected valuable improvements instead thereof, and which he had intended to have placed upon his own lot, and the defendant was present and encouraged the work, the part performance was held to be sufficient.(i) So building houses in reliance of certain neighboring ground being left open as agreed upon.(j) But buying a house to put upon the property, but not doing so, is insufficient.(k) So putting repairs upon property.(l)

§ 589. The following are some examples of part performance by improvements made. Thus, building a party-wall under an agreement relating thereto.(m) Sinking a shaft in an adjoining property to get at coal in premises leased by parol is sufficient.(n) So, buying the dominant tenement with a view to extinguish a right of way, and building a stone wall across the ground subject to the easement.(o)

Where the plaintiff under a contract of lease was put to great expense in remodelling the block of stores at the request of the defendants, who took possession as lessees and paid rent for a part of the term, but neglected to execute the lease tendered them by the plaintiff, the part performance is sufficient.(p) So, tearing down property with the intention to rebuild according to the contract.(q)

(d) *McCarger v. Rood*, 47 Cal. 141.

(e) *Wilber v. Payne*, 1 Hamm. 253.

(f) *Renwick v. Bancroft* (S. C. Ia.), 9 Nor. West. Rep. 368.

(g) *Linsley v. Tibbals*, 40 Conn. 522.

(h) *Morrison v. Peay*, 21 Ark. 110; *Martin v. McCord*, 5 Watts, 494; *Taylor v. Rowland*, 26 Tex. 294; *Neale v. Neales*, 9 Wall. 9; *Beaver v. Filson*, 8 Pa. St. 334.

(i) *Hibbert v. Aylott*, 52 Tex. 533.

(j) *Tallmadge v. East River Bank*, 26 N. Y. 105.

(k) *Poland v. O'Connor*, 1 Neb. 50.

(l) *Shillibeer v. Jarvis*, 8 DeG. M. & G. 81.

(m) *Brown v. McKee*, 57 N. Y. 684; as to paying part of the cost thereof, see *Rawson v. Bell*, 46 Ga. 19.

(n) *Benecke v. Chadwicke*, 4 W. R. 688.

(o) *Pope v. O'Hara*, 48 N. Y. 452.

(p) *Seaman v. Ashermann*, 51 Wis. 682.

(q) *Pembroke v. Thorpe*, 3 Swanst. 442, note. For other examples of this general kind of part performance, see *Adams v. Patrick*, 30 Vt. 520; *Whitson v. Smith*, 15 Tex. 35; *Reedy v. Smith*, 42 Cal. 245.

So, fencing land.(r) Improvements to be sufficient part performance must be more than ordinary husbandry,(s) or such merely as are necessary in the use of the land;(t) such as the removal of a fence and the cutting down of a few old trees.(u)

Where the defendant offered to prove that the defendant made valuable improvements on the premises, to wit, making fences, painting fences, making pavements and walks, planting lot with trees, steps into the cellar, and otherwise improved it (objected to), [the court asked: "All of the value of about how much?"] "To the amount of \$50, exclusive of her own labor," was the answer, and the part performance was held to be insufficient.(v) Cutting brush and clearing bogs, insufficient.(w) Where the profits of the land, or its rental value, exceed the cost of the improvements, the part performance is insufficient.(x) Especially is this the case when actual compensation has been made.(y) The burden of showing that the improvements were not repaid by the use of the property is apparently upon the party relying upon the part performance.(z)

Where the improvements are not susceptible of compensation in damages, they are sufficient.(a) But if so susceptible, whether actually reimbursed or not, the part performance is insufficient.(b) It has even been said that it will be presumed that the cultivation of land is rewarded by the produce.(c) As has been said before, repairs under an old lease in the expectation of a new one are not sufficient.(d) So, temporary erections and the cultivation of timber, though the land was timber land, of which such acts were the usual ones of ownership.(e)

(r) *Morrison v. Peay*, 21 Ark. 110; *Rutherford v. Sargent*, 71 Ill. 342; *Wilber v. Paine*, 1 Hamm. 253.

(s) *Spalding v. Conzelman*, 30 Mo. 182; *Wood v. Thornly*, 58 Ill. 467.

(t) *Cox v. Cox*, 26 Pa. St. 381; *Baker v. Hollobaugh*, 15 Ark. 327; *Gudgell v. Duvall*, 4 J. J. Marsh. 230.

(u) *Jervis v. Smith*, 1 Hoff. Ch. 472.

(v) *Dankel v. Balliet*, 8 W. N. C. 387.

(w) *Terry v. Chandler*, 16 N. Y. 354.

(x) *Meriwether v. Meriwether*, 3 Litt. 418; *Wack v. Sorber*, 2 Whart. 392; *Holmes v. Holmes*, 49 Ill. 32; *Bailey v. Edmunds*, 64 Ill. 126; *Ann Berta Lodge*

v. Leverton, 42 Tex. 25; *Baker v. Hollobaugh*, 15 Ark. 327.

(y) *Eckert v. Eckert*, 3 P. & W. 332.

(z) *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346.

(a) *Ballard v. Ward*, 89 Pa. St. 362.

(b) *Wible v. Wible*, 1 Grant (Pa.), 406; *Whiting v. Pittsburg Opera Co.*, 88 Pa. St. 101; *Shellhammer v. Ashbaugh*, 83 Pa. St. 28.

(c) *Jervis v. Smith*, 1 Hoff. Ch. 472.

(d) *Byrne v. Romaine*, 2 Edw. Ch. 445.

(e) *Gangwer v. Fry*, 17 Pa. St. 495.

The occasional cutting and hauling of timber in forest land is not sufficient part performance of a contract relating to boundary.(f) For examples of insufficient part performance by improvements made, see (g).

§ 590. Payment of all or part of the purchase-money is a circumstance of part performance.(h) Before the Statute of Frauds part payment was a sufficient reason for decreeing the specific enforcement of a contract relating to land, if any reliance is to be placed upon *Tot-hill*.(i) A payment of fifty-five shillings on account of a sale of land was the only execution, but a bill to be relieved of the promise was dismissed in 30 Jac. I.(j)

In 15 Car. II. a demurrer to a bill for specific performance was allowed, because the contract was not under hand and seal, and only twenty shillings was paid as earnest.(k) But an oral purchase of a house was in 21 Car. II. decreed in favor of a vendee who had paid twenty shillings and tendered the rest of the price, £289, at the day.(l) Where there was the full measure of part performance and a tender of the residue of purchase-money unpaid, it is not material, if there was at the date of the trial, as shown by a special finding, more purchase-money due than was tendered.(m) The payment may be made by a third person for the benefit of the party claiming the benefit of the part performance.(n) The payment may be of a debt of the vendor.(o)

Taking possession of land, making improvements, and paying off a mortgage thereon, are sufficient part performance.(p) Where a railroad which had acquired the right to a certain tract of the

(f) See *Nye v. Taggart*, 40 Vt. 299.

(g) *Ann Berta Lodge v. Leverton*, 42 Tex. 24; *Lord v. Underdunk*, 1 Sandf. Ch. 48; *Towlerton v. Davidson*, 7 Minn. 411; *Wood v. Thornly*, 58 Ill. 468; *Kinyon v. Young*, 44 Mich. 340.

(h) *Millard v. Harvey*, 34 Beav. 237; *Kinyon v. Young*, 44 Mich. 340; *Norris v. Cooke*, 7 Ir. C. L. Rep. 41; *Ash v. Daggy*, 6 Porter (Ind.), 259; *Ludwig v. Leonard*, 9 W. & S. 49; *Eaton v. Whitaker*, 16 Conn. 229; *Fiero v. Fiero*, 52 Barb. 288; *Morrill v. Cooper*, 65

Barb. 516; *Walsh v. Rundlette*, 2 McArthur, 120.

(i) *Moyle v. Horne*, Toth. 5; see *Sug. Vend.* 152.

(j) *Miller v. Blandish*, Toth., Holb. ed., p. 24, pl. 23 (p. 85).

(k) *Simmons v. Cornelius*, 1 Rep. in Ch. (folio) 128.

(l) *Voll v. Smith*, 3 Rep. in Ch. (fol.) 16.

(m) *Higbee v. Moore*, 66 Ind. 264.

(n) *Millard v. Harvey*, 34 Beav. 237.

(o) *Mason v. Bair*, 33 Ill. 207.

(p) *Armstrong v. Fearnau*, 67 Ind. 433.

claimant's land agreed to give this up if the claimant would waive his right of damages for other land of his taken by the railroad, the question was raised, but not decided, whether the claimant's forbearance to claim these damages was a part payment under the contract with the railroad as to the land first spoken of.(q)

Where titles have been enjoyed, and the interest on the purchase-money paid for a series of years, the case was held to have been taken out of the Statute of Frauds, though, it seems, but for the length of time, the part performance would have been insufficient.(r) Payment of part of the price, together with possession, has been held, in analogy to the part performance of oral contracts, to be sufficient to begin adverse possession.(s)

The rule of part payment as part performance has no application to a guaranty, and that the promisee has parted with his money on the faith of the latter, has no effect even under § 1951 of the Georgia Code.(t) Where a contract of the sale of land was orally rescinded before the price had been paid, and the part performance in the case having on other grounds been sustained, the consideration of the oral contract was regarded as virtually paid by the waiver of the claim for the price reserved in the original agreement.(u)

§ 591. Part payment is not, however, generally essential to part performance.(v) In Iowa it has been doubted whether either part payment or possession taken was

Payment not essential. (q) *Barnes v. Boston &c. R. R.*, 130 Mass. 389.

(r) *Blackford v. Kirkpatrick*, 6 Beav. 235; 12 L. J. Ch. 111.

(s) *Morgan v. Taylor*, 55 Ga. 226.

(t) *Daniel v. Mercer*, 63 Ga. 444.

(u) *Arrington v. Porter*, 47 Ala. 721.

(v) *Purcell v. Miner*, 4 Wall. 513; *Allen v. Booker*, 2 Stew. 21 (Ala.); *Keatts v. Rector*, 1 Ark. 391; *Underhill v. Allen*, 18 Ark. 466; *Black v. Black*, 15 Ga. 445; *Blunt v. Tomlin*, 27 Ill. 93; *Johnston v. Glancy*, 4 Blackf. 94; *Eastburn v. Wheeler*, 23 Ind. 305; *Glass v. Hulbert*, 102 Mass. 24; *Blodgett v. Hildreth*, 103 Mass. 486; *Hood v. Bowman*, 1 Freem. Ch. 290; *Bean v. Valle*, 2 Mo. 126; *Park v. Leewright*, 242

20 Mo. 85; *Townsend v. Hawkins*, 45 Mo. 288; *Poland v. O'Connor*, 1 Neb. 53; *Newton v. Swazey*, 8 N. H. 13 (*dub.*); *Kidder v. Barr*, 35 N. H. 235; *Campbell v. Campbell*, 3 Stockt. 278; *Rice v. Peet*, 15 Johns. 503; *Haight v. Child*, 34 Barb. 186; *Malins v. Brown*, 4 Comst. 407; *Cagger v. Lansing*, 43 N.Y. (Hand), 550; *Sites v. Keller*, 6 Hamm. 483; *Allen's Estate*, 1 W. & S. 383; *Parker v. Wells*, 6 Whart. 153; *McKee v. Phillips*, 9 Watts, 85; *Pattison v. Horn*, 1 Grant (Pa.), 301; *Newkumet v. Kraft*, 31 Leg. Int. 109; *Van Loon v. Davenport*, 1 W. N. Cas. 320; *Givens v. Calder*, 2 Desaus. Ch. 171; *Church of Advent v. Farrow*, 7 Rich. Eq. 382; *Hatcher v. Hatcher*, 1 Mc-

alone sufficient.(w) But part payment has been sometimes regarded as essential.(x) By statute in Alabama a part at least of the purchase-money must be paid, and the purchaser be put into possession.(y) It has been recently decided by the Supreme Court of the United States that the consideration must have been paid or tendered; but this may mean only that a vendee claiming(z) enforcement of the contract must be ready to do his part.

§ 592. The great weight of authority supports the rule which treats part performance alone as being insufficient part performance.(a) It is an argument against part payment being considered a valid part performance of a contract relating to land that the Statute of Frauds

Payment alone insufficient part performance.

Mull. Eq. 311; Smith v. Smith, 1 Rich. Eq. 130; Anderson v. Chick, Bailey's Eq. 118; Hyde v. Cooper, 13 S. Car. Eq. 254; Garner v. Stubblefield, 5 Tex. 558; Wood v. Jones, 35 Tex. 64; Payne v. Graves, 5 Leigh, 561; Bowles v. Woodson, 6 Gratt. 78; Blanchard v. McDougal, 6 Wis. 167.

(w) Fairbrother v. Shaw, 4 Iowa, 571.

(x) Letcher v. Crosby, 2 A. K. Marsh. 107; Updike v. Armstrong, 4 Ill. 568; Holmes v. Holmes, 44 Ill. 168; Fairbrother v. Shaw, *supra*.

(y) Carroll v. Powell, 48 Ala. 301; Rev. Code 1862, § 1551; Hart v. McClellan, 41 Ala. 252.

(z) Williams v. Morris, 95 U. S. C. 456.

(a) See the cases cited *supra*, § 591, n. (v). Anon., Freem. K. B. 486; Pengall (Lord) v. Ross, 2 Eq. Cas. Abr. 46; *Re Gulliver*, 2 Jur. 700; 27 L. T. N. S. 258; Clinan v. Cooke, 1 Sch. & Lef. 31; *Ex parte Storer*, Davies' Rep. 297; Brock v. Cook, 3 Porter (Ala.), 466; Tainter v. Brockway, 1 Root, 59; Church v. Sterling, 16 Conn. 400; Eaton v. Whitaker, 16 Conn. 229; Fox v. Kimberly, 27 Conn. 316; Tate v. Jones, 16 Flor. 239; Hawkins v. Hunt, 14 Ill. 43; Robbins v. Butler, 24 Ill. 387; Lloyd v. Strobbridge, 10 Chic. Leg. News, 1; Hixon v. Cuppy, 33 Ind. 213; S. C. *sub*

nom. Cuppy v. Hixon, 29 Ind. 523; Carliale v. Brennan, 67 Ind. 18; Johnson v. Macconnell, 3 Bibb, 1; Bobb v. Bobb, 3 Litt. 240; Frostburg Coal Co. v. Thistle, 20 Md. 190; Hopkins v. Roberts, 54 Md. 316; Thompson v. Gould, 20 Pick. 138; Sanborn v. Sanborn, 7 Gray, 146; Hood v. Bowman, 1 Freem. Ch. 292; Bean v. Valle, 2 Mo. 126; Chambers v. Lecompte, 9 Mo. 577; Galway v. Shields, 1 Mo. App. 549, 66 Mo. 313; Blew v. McClelland, 29 Mo. 306; Ayer v. Hawks, 11 N. H. 152; Ham v. Goodrich, 33 N. H. 36; Kidder v. Barr, 35 N. H. 253; Cole v. Potts, 2 Stockt. (N. J.) 68; Smith v. McVeigh, 3 Stockt. 240; Rhodes v. Rhodes, 3 Sandf. Ch. 281; Malins v. Brown, 4 Comst. 407; Miller v. Ball, 64 N. Y. 291; Odell v. Montross, 68 N. Y. 502; Morrill v. Cooper, 65 Barb. 516; Sites v. Kellar, 6 Ohio, 489; Pollard v. Kinner, 6 id. 528; Armstrong v. Kattenhorn, 11 Ohio, 271; Allen's Estate, 1 W. & S. 385; Parriah v. Koons, 1 Parsons' Eq. Cas. 84, 85; Parker v. Wells, 6 Whart. 153; McKee v. Phillips, 9 Watts, 85; Brawdy v. Brawdy, 7 Pa. St. 157; Miller v. Specht, 11 Pa. St. 455; Hill v. Myers, 43 Pa. St. 172; Weise's Appeal, 72 Pa. St. 355; Spencer's Appeal, 80 Pa. St. 330; Newkumet v. Kraft, 31 Leg. Int. 109; Van Loon v. Davenport, 1 W. N. C.

expressly allows such an effect in the case of chattels, but is silent on the point so far as land is concerned.(b) This question has often been referred to without being settled; the suggestion that the part payment was ineffectual as part performance generally accompanying the expression of the doubt.(c) In Georgia, by an act since repealed, part payment was made part performance.(d)

In *Watt v. Evans*, a contract by parol was entered into fifteen years before for the purchase of an estate for the price of £800, and £50 was paid, and it was held that this did not take the case out of the Statute of Frauds; Lord Lyndhurst, C. B., saying that: the balance of authority upon the cases was in favor of the contract not being taken out of the statute, although the payment was of a substantial or material part of the purchase-money, and so was the reasoning. The two arguments were, first, the impossibility of drawing the line between substantial and unsubstantial; and, secondly, that the statute allowed earnest money, or part payment of purchase-money, to be available in the case of personal estate, which negatived its being allowed to have that effect in the case of real estate. To this argument it had been replied that it had proved too much, for delivery or part delivery of goods is expressly allowed by the statute to take a contract out of it, and yet it is not considered to negative the position that delivery of possession of real estate shall have the same effect. But to this it is answered, that were not the delivery of possession of lands to take the case out of the

Phil. 320; *Smith v. Spencer*, 2 W. N. C. 518; *Eargood's Estate*, 1 Pearson, 400; *Hart v. Hart*, 3 Desaus. 595; *Smith v. Smith*, 1 Rich. Eq. 134; *Church v. Farrow*, 7 Rich. Eq. 384; *Hatcher v. Hatcher*, 1 McMull, Eq. 317; *Miller v. Jones*, 3 Head, 525; *Dugan v. Colville*, 8 Tex. 128; *Wood v. Jones*, 35 Tex. 66; *Lodge v. Levertton*, 42 Tex. 24; *Sutton v. Sutton*, 13 Vt. 79; *Ballard v. Bond*, 32 Vt. 358, 359; *Whitcher v. Morey*, 39 Vt. 459; *Jackson v. Cutright*, 5 Munf. 311; *Smith v. Finch*, 8 Wis. 249; *Campbell v. Thomas*, 42 Wis. 441, 448. See 25 Solic. Jour. 739 and 790; *Law Rev.* vol. I. 1st Ser. p. 111.

(b) *Fannin v. McMullen*, 2 Abb. Pr. 225.

(c) In *Aveling v. Knipe*, 19 Ves. 446, Sir Wm. Grant asked whether part payment were part performance. See *Anon.*, 2 Freem. (Eng.), p. 128, pl. 154; *Buckmaster v. Harrop*, 7 Ves. 344; *Watson v. Mahan*, 20 Ind. 226; *Pearson v. East*, 36 Ind. 29; *Rhodes v. Frick*, 6 Watts, 317; *Richmond v. Foote*, 3 Lans. 249; *Malins v. Brown*, 4 Comst. 407; *Newton v. Swazey*, 8 N. H. 13; *Wilber v. Paine*, 1 Hamm. 253; *Johnson v. Craig*, 21 Ark. 538; *Givens v. Calder*, 2 Desaus. 171; *Garner v. Stubblefield*, 5 Texas, 558.

(d) Act February 20th, 1854, P. L. 58, repealed by act 1856; *Sorrell v. Jackson*, 30 Ga. 901.

statute, the purchaser would be led into difficulties, and would be a trespasser. Considering that there was a conflict of opinion, the Chief Baron dismissed the bill seeking to establish the contract, without costs.(e)

As money paid can be recovered back at law, the position of the payer is not such as to require equitable help,(f) and even though the payee is insolvent, no exception is made.(g) The entry of satisfaction on a judgment can have no effect as part performance of a contract relating to land.(h)

Where a person has given promissory notes for the price of land, and has had the negotiation of these enjoined in equity, he has in no way suffered, and there is no part performance.(i) The payment of the person's own debt is no part performance.(j)

Marriage and payment of interest on a marriage portion are not sufficient part performance.(k) Performance of services which are the consideration of a promise to convey land is not part performance; they are in the nature of part payment, and can be made the subject of compensation.(l)

The finding that an invalid oral contract that services are to be paid for in land is a good defence to a suit, as the implied contract for the value of the services is not inconsistent with the doctrine that part payment is not part performance; the latter being intended only for the protection of vendors,(m) and payment is not part performance even where the consideration for land was to be partly in services and partly in money.(n)

Payment of auction duty is no part performance, because it is merely what is required by law.(o) Giving security for payment has even less effect than actual payment.(p)

(e) 4 Y. & C. Ex. 579. See *Main v. Gulliver*, 2 Jur. N. S. 700; 27 L. T. 258. *Melbourn*, 4 Ves. Jr. 724.

(f) *Purcell v. Miner*, 4 Wall. 517; *Suman v. Springate*, 67 Ind. 122.

(g) *Newkumet v. Kraft*, 31 Leg. Int. (S. C. Pa.) 109, citing cases. (m) *Mitchell v. McNab*, 1 Bradw. 300.

(j) *McKee v. Phillips*, 9 Watts, 86.

(k) *Goucher v. Martin*, 9 Watts, 109.

(i) *Gilbert v. Trustees of East Newark*, 1 Beasley, Ch. 203.

(j) *Starin v. Newcomb*, 13 Wis. 521.

(k) (*Ex parte*) *Barter*, Mont. Ca. in *Bankr.* 135; (*Re*) *Gulliver*, *Stroughill v.*

(l) *Edwards v. Estell*, 48 Cal. 196; see

(n) *Horn v. Ludington*, 32 Wis. 76.

(o) *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 473.

(p) *Parker v. Wells*, 6 Whar. 161; *Dougan v. Blocher*, 24 Pa. St. 33; *Rice v. Peet*, 15 Johns. 503 (a promissory note was given); see *Gilbert v. Trustees*, *supra*.

§ 593. Part payment has however been sometimes regarded as being sufficient part performance.(q) If clearly so intended.(r) Two cases in Tothill would seem to show that before the Statute of Frauds part payment was a reason for giving specific performance of a contract relating to lands. In one it is said that the "defendant promised to sell the plaintiff land whereof ten shillings were given him; the defendant would not perform, yet he should."(s) But see *semble* contra, *Miller vs. Blandish*, Toth. 8, Holb. ed., p. 24, pl. 23 (p. 85); *Simmons vs. Cornelius*, 1 Rep. in Ch. (fol.) 128.

Lord Maclesfield in *Child v. Comb* was disposed to look upon payment as being performance; for he said that "the fees paid to the counsel, the drawing of the drafts and engrossing them, and the plaintiff providing his purchase-money, are as much an execution of it on his part as the laying out money on the building was in the other case.(t) In a case in *Vernon*, where one of two joint lessees sold for four guineas his interest to the other, who handed over a pair of compasses to bind the bargain, the court ordered the defendant to answer, saving to him the benefit at the hearing of the plea of the Statute of Frauds.(u) In an early Pennsylvania case will be found a collection of the authorities which support the sufficiency of part payment as part performance.(v) And though, as we have seen, this is not the law of that State, yet it seems that part payment was once regarded there as part performance in an

(q) *Lacon v. Mertins*, 3 Atk. 4; (Holb. ed. p. 162), pl. 128. See also *Thompson v. Tod*, 1 Peters, C. C. 388; *Clarke v. Hackwell*, Id., same page; see also *Voll v. Smith*, 3 Rep. in Ch. (fol.) 76.

(r) *Child v. Comb*, 3 Swanst. 426, note.

(s) *Alsopp v. Patten*, 1 Vern. 472.
(t) *Allen's Estate*, 1 W. & S. 385, citing *Hales v. Van Berchem*, 2 Vern. 618; *Owen v. Davies*, 1 Ves. Sr. 82; *Main v. Melbourn*, 4 Ves. Jr. 724; *Clinan v. Cooke*, 1 Sch. & Lef. 31; *Skett v. Whitmore*, Freem. Ch. (Eng.) 280; see *Parker v. Wells*, 6 Wharton, 161, citing cases and considering the early Pennsylvania rule to be to that effect prior to *McKee v. Phillips*.

(u) *Green v. Richards*, 8 C. E. Green, 33; *Meach v. Perry*, 1 Chip. 185.

(v) *Ferne v. Bullock*, Toth. 206

action of damage for the breach of an oral contract relating to land.(w)

In Texas it has been suggested that where lands rise rapidly in value, part payment ought to be part performance.(x) It has been said that the doubt as to payment being part performance arose in cases where it did not appear that the payment really was in performance of the contract; but that if this was as clear as in the case under consideration, the part performance was sufficient.(y) In Iowa the same view seems to have been taken;(z) and now by statute payment is made part performance, and the statute applies even to an exchange of lands.(a) There is a statute to the like effect in Wisconsin.(b)

A distinction between a small part payment and what was called a substantial part payment was made at an early day in England, the latter being treated as sufficient part performance,(c) and the payment of the whole purchase-money has been held sufficient;(d) but the payment even of the whole purchase-money has been denied any effect.(e)

The following are some examples of part payment regarded as sufficient part performance. Thus, payment for one of several tracts sold at an entire price is sufficient.(f) Where the plaintiff agreed by writing to buy the defendant's land, and as part of the price paid a debt due by the defendant to a third person, specific performance was decreed,(g) or where the part payment is by one

(w) *Bell v. Andrews*, 4 Dall. 152.

(x) *Neatherly v. Ripley*, 21 Tex. 435.

(y) *Townsend v. Houston*, 1 Harring. 540. See *Houston v. Townsend*, 1 Del. Ch. 422.

(z) *Morgan v. McLaren*, 4 Greene (Ia.), 537.

(a) *Devin v. Himer*, 29 Ia. 299.

(b) *Smith v. Bouck*, 33 Wis. 25.

(c) *Main v. Melbourne*, 4 Ves. Jr. 724, citing *Dickenson v. Adams*. See cases cited in the notes to Sumner's ed. See also *Garner v. Stubblefield*, 5 Tex. 558; *Cosack v. Descoudres*, 1 McCord, 425; *Houston v. Townsend*, 1 Del. Ch. 422 (there can be no argument made from 17th section, because this is not in force in Delaware).

(d) *Rawlins v. Shropshire*, 45 Ga.

188; see *Fammin v. McMullen*, cited in 65 Bart. 516; *Haister v. Savannah R. R.*, 51 Ga. 202; *Freeman v. Cooper*, 14 Ga. 241; as to the Georgia statute see *Sorrell v. Jackson*, 30 Ga. 201, *supra*.

(e) *Price v. Price*, 17 Flor. 606; *Glass v. Hulbert*, 102 Mass. 33; *Temple v. Johnson*, 71 Ill. 16; *Horn v. Ludington*, 32 Wis. 76; *Eargood's Estate*, 1 Pearson, 400; *Morrill v. Cooper*, 65 Barb. 516, citing cases; *Johnson v. Canada Cent. R. R.*, 5 Grant, Ch. 558.

(f) *Jones v. Pease*, 21 Wis. 644; *Smith v. Underdunk*, 1 Sandf. 579.

(g) *Story v. Menzies*, 3 Pinn. (Wis.) 330; 4 Chand. 61.

having an equitable interest, and where the payment may raise a resulting trust.(h)

Where the party sought to be charged had given certain promissory notes under the contract, and where the other party had not signed, it was left as a question to the jury whether there was sufficient performance by both parties.(i) This view was urged at one time in Pennsylvania.(j)

In a case in the Common Pleas of New York city, payment of the whole price was treated as part performance under circumstances strongly indicative of fraud on the part of the person who relied upon the Statute of Frauds; the facts were as follows: The defendant, McMullen, having bought a lot with an unfinished house, and being unable to pay all the price or to finish the house, agreed with the plaintiff that they should each pay half of the price and half of the cost of finishing the house, and resell and divide the profits; the title was put in the name of one Fenner, who was irresponsible; McMullen failed to pay all his share, and, agreeing with Fenner, refused to fulfill the contract; the plaintiff brought a bill for specific performance, to which the defendant set up the Statute of Frauds.(k)

A memorandum insufficient because not stating the price, be-

(h) *Artz v. Grove*, 21 Md. 470.

(i) *Weightman v. Caldwell*, 4 Wheat. 85 (see notes by reporter).

(j) *Parker v. Wells*, 6 Whart. 161, in the court below per Bell, J.

(k) *Fannin v. McMullen*, 2 Abb. Pr. N. S. 225; the court, after admitting that part payment was not sufficient part performance, declared that whole payment was; saying: "The contract is then fully executed by one, and equity demands that the other should be compelled to bear his part of it. 'Where one part of the agreement,' said Lord Hardwicke in *Walker v. Walker* (*supra*), 'is performed on one side, it is but common justice that it be carried into execution on the other.' If a transaction like this could be consummated by reason of the statute, it might be justly characterized as a statute rather than the en-

couragement than for the prevention of frauds. It would be a reproach to the law if the aid of a court of equity could not be invoked in such a case. Its right to interpose may be rested upon three grounds. 1. That the plaintiff has executed his part of the agreement by paying even much more than he was bound by the terms of it to pay. 2. That the facts warrant the presumption of a fraudulent design on the part of the defendants McMullen and Fenner. 3. That Fenner is irresponsible, and it is to be inferred that McMullen is a person of little or no pecuniary ability, as he was unable to meet his proportion of the payments as they fell due, making it highly probable that the plaintiff would lose what he had paid, if the court should refuse to compel a specific performance of the contract."

comes valid when in fact the price has been paid.(l) Where the plaintiff had claimed that the defendant had not conveyed to him certain land, and had induced the defendant to repay the purchase-money paid, he cannot bring ejectment for the land, because, the defendant having altered his situation, he the plaintiff is estopped.(m) Part payment by furnishing certain goods has been held sufficient.(n)

In the Privy Council, upon an appeal from the Chancery Court of Barbadoes, it was apparently considered that where the petitioners had advanced moneys to an executor, in consideration of an oral agreement with him that in consideration of such advances they should have a lien on the crops of the estate, the contract was partly performed to take it out of the Statute of Frauds.(o)

It seems in Iowa, that an agreement that a debt due by the vendee to the vendor should go as part of the purchase-money of land orally sold, may take the case out of the statute.(p) For an example of part payment, held under the circumstances to be sufficient part performance, see below.(q)

§ 594. An agreement to apply mutual debts in satisfaction of each other will not operate as a satisfaction in the case of contracts within the Statute of Frauds, the agreement not being even payment.(r) A payment by a treat of drinks, before the payment under the contract was due, is insufficient.(s)

General examples of part payment as insufficient part performance.

Deposit of the price of land with an agent of the vendee is insufficient, though with notice to the vendor;(t) and such a deposit with a third person does not prevent the vendee refusing the deed and directing the third person not to pay over the money;(u) nor can the vendor, who is partly paid, and who has delivered the deed in escrow until all the price is paid, recover the unpaid balance of the price; the Statute of Frauds is a bar.(v) Part payment will not give such a lien on land as will justify its sale in chancery.(w)

(l) *Johnson v. Ronald*, 4 Munf. 78.

(m) *Campbell v. Johnson*, 44 Mo. 251.

(n) *Owings v. Low*, 7 Harr. & J. 133.

(o) *Daniel v. Trotman*, 1 Moore, P. C. C. 149.

(p) *Brown v. Wade*, 42 Ia. 649.

(q) *Lester v. Kinne*, 37 Conn. 9.

(r) *Mattice v. Allen*, 3 Abb. App. Dec. 248.

(s) *Hart v. McClellan*, 41 Ala. 251.

(t) *Lanz v. McLaughlin*, 14 Minn. 72.

(u) *Murray v. Pate*, 5 Dana (Ky.), 336.

(v) *Cagger v. Lansing*, 43 N. Y. 550.

(w) *McNew v. Toby*, 6 Humphr. 27.

Part payment of price of land orally sold, or it seems whole payment, will not give a settlement.(x) Payment of a month's rent is not part performance of a contract of lease.(y) In the note will be found a citation of cases in which certain part payments were held to be insufficient as part performance.(z)

§ 595. Transfer of land on the tax list is a circumstance of part performance.(a) Where there was a purchase by a father with the money of his son of tract A., and an oral agreement that this amount should go into tract B., and the tenant on tract A. was notified to pay the rent to the father, and the assessments of the tracts were changed, the part performance was sufficient, so as to establish the son's title to tract B.(b)

Mere payment of taxes stands on a different footing, and in Pennsylvania is not perhaps enough.(c) The payment of taxes has been, however, in some instances regarded as significant, and certainly as adding force to the effect of possession as part performance.(d) Where commissioners appointed to drain land were to collect taxes from the land benefited and to pay for such land as they required for their business, and they agreed to collect no taxes in a certain case until the taxes should equal the damages,

(x) *Augusta (Overseer of) v. Paris (Overseer of)*, 16 Johns. 280.

(y) *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 19; 43 L. J. Ex. 9; see *Doe d. Hughes v. Jones*, 9 M. & W. 376; 6 Jur. 302; 1 Dowl. N. S. 352; 12 L. J. Exch. 265

(z) *Smith v. Bouck*, 33 Wis. 25; *Wiswell v. Tefft*, 5 Kan. 266; *Townsend v. Sharp*, 2 Overt. 192; *Egbert v. Butter*, 21 Beav. 563; *Townslay v. Charles*, 2 Grant, Ch. 315; *King v. Morford*, Saxt. 280; *Cronk v. Trumble*, 66 Ill. 432.

(a) *Morrison v. Peay*, 21 Ark. 110; *Atkinson v. Jackson*, 8 Ind. 33; *Aurand v. Wilt*, 9 Pa. St. 54.

(b) *Lee v. Lee*, 9 Pa. St. 178; see *Atkinson v. Jackson*, 8 Ind. 32, where in a case not dissimilar, the change of assessment was made a point of. See

Christy v. Barnhart, 14 Pa. St. 261, which considers *Lee v. Lee* an extreme case, and which gave more weight to the possession than to the change of assessment. But see *Miranville v. Silverthorn*, 1 Grant (Pa.), 411, in which assessment of the land for taxes for several years with the consent of the defendant, who gave possession to the vendee who inclosed the land with his own, was held good part performance.

(c) *Cox v. Cox*, 26 Pa. St. 381; and *Smith v. Spencer*, 2 W. N. Cas. 518, where, however, the claimant had as trustee paid the taxes for a long time previous to the contract under which he claimed.

(d) *Bomier v. Caldwell*, 8 Mich. 474; *S. C. Harr. Ch. 67*; *Hughes v. Lindsey*, 31 Ia. 332; *McCray v. McCray*, 30 Barb. 635.

the agreement acted upon for many years was held not to be within the Statute of Frauds.(e)

Where, under a parol promise by K. to give the plaintiff the right to back water on K.'s land in consideration of K.'s opening a road over the plaintiff's land; and the road was opened and the plaintiff continued, as he had previously been doing, to back the water, the contract was, on the ground of part performance, specifically enforced even against K.'s assignee.(f)

In another place will be considered the question, whether an oral contract to reward services by a gift or devise of land is so far affected by the Statute of Frauds as to make evidence of the value of the land inadmissible or at least not admissible as a standard by which to measure the value of the services. The question for present consideration is a closely analogous one, viz., how far services are part performance of an oral contract relating to land. That they are such part performance has sometimes been so broadly laid down as to include the case of a contract, wherein the gift or devise of the land is the consideration for the services. Where the services are incapable of a money valuation, such is generally the rule.(g) Thus, working and improving a farm and supporting a father, are sufficient part performance of a promise by the latter to devise the farm.(h) So, where the father's promise was to convey the land, and in consideration thereof the son not only occupied and improved the land, but released a claim he had against the father for labor done.(i)

Where an uncle adopted a nephew and promised to give him property, and the nephew came and lived with and worked for him, and his father left his estate to his other children, the part performance was held sufficient.(j) Under an Iowa statute which requires contracts with school teachers to be in writing and by the

(e) *Murray v. Jayne*, 8 Barb. 612. For an example of insufficient part performance through payment of taxes, see *Towlerton v. Davidson*, 7 Minn. 411.

(f) *Nicol v. Tackaberry*, 10 Grant, Ch. 115.

(g) *Rhodes v. Rhodes*, 3 Sandf. Ch. 283.

(h) *Davison v. Davison*, 2 Beasly, 246; see *Watson v. Mahan*, 20 Ind. 223;

Sutton v. Hayden, 62 Mo. 112, the donor in this case was not a parent; *Langdon v. Guy*, 12 N. Y. Week. Dig. 241.

(i) *Haddon v. Haddon*, 42 Ind. 378; see *Hotchkiss v. Cox*, 47 Ia. 667, where there was forgiveness of a debt and nursing and caring for the promisor by the promisee.

(j) *Van Dyne v. Vreeland*, 1 Beasly, 150; 2 Stockt. Ch. 378.

week, it was held that service for seven weeks out of nine, and which was paid for, is sufficient part performance to take the whole contract out of the statute.(k)

Purchase of land and the hiring of labor to carry out a contract may be sufficient part performance.(l) It has already been said that where the personal labor is the consideration of the transfer of the land, the former is not always regarded as taking the contract out of the Statute of Frauds.(m) Where the services are not more than equivalent to the expense of supporting and caring for the employé, there is no part performance.(n) A contract, A. having conveyed to B., that B. shall sell if possible at a higher price and share the profits with A., is sufficiently part-performed by A. finding a purchaser willing to give such higher price.(o)

§ 596. A conveyance of land at a low price, upon the condition that the vendee make a lease for life to a certain person, is a part performance of the latter stipulation.(p) The defendants, who owned certain land, procured the plaintiff to get a conveyance to them of a certain outstanding interest, and promised to convey him one-fourth of the land, and another fourth to F., the owner of the outstanding interest. The plaintiff, as agent for F., made the deed to the defendants, who reconveyed to F. one-fourth, but refused to convey the plaintiff his fourth. The conveyances executed were held to be sufficient part performance.(q)

Where a mortgagee with a power of sale agreed with the plaintiff by writing not to sell without his consent, and the plaintiff gave this consent upon a condition, and the plaintiff and the defendant, to whom the mortgagee had leased the land, signed a memorandum stating this condition, it was held that the plaintiff's giving his consent, without which the defendant refused to take the lease, was sufficient part performance to satisfy the Statute of Frauds, even if the paper signed by the plaintiff and the defendant

(k) *Cook v. School District*, 40 Ia. 349; 5 Exch. D. 294, reversed above 445; *School Laws* 1872, § 51. in 7 Q. B. D. 174.

(l) *Bryan v. Southwestern R. R.*, 37 (o) *Ballard v. Bond*, 32 Vt. 358. Ga. 41. (p) *Crocker v. Higgins*, 7 Conn. 342.

(m) *Mackubin v. Clarkson*, 5 Minn. (q) *Bogart v. Patterson*, 14 Grant, Ch. 247; see "Land." 627, citing *Clark v. Eby*, 11 id. 98; 13

(n) *Cuddy v. Brown*, 78 Ill. 420; see id. 371; see *Shennan v. Parsill*, 18 id. *Alderson v. Maddison*, 43 L. T. N. S. 10.

was inadequate of itself.(r) A conveyance by a husband and wife passing her dower and homestead rights is sufficient part performance of a verbal contract with the wife that, if she would so join in her husband's deed, the vendee would convey other land to her.(s)

Where it is agreed that, if two of several lessees retire and release their interest to the other, the lessor will reduce the rent and grant a new lease, and the release so agreed upon takes place by which two of the lessees, the plaintiffs, take upon themselves the liability which before was shared by four, and a surrender of the previous interests is made; the part performance is sufficient to bind the landlord to give a new lease.(t) Where, as we have seen, an uncle promised to adopt his nephew, and the latter's father relying on the promise devised his property solely to his other children, there is part performance.(u) Where the refraining from bidding would operate as a fraud on another's right, it is not good part performance.(v)

That a mortgagor omits to have a sale of foreclosure set aside is sufficient part performance of a promise by the mortgagee, who had bought the land in, to reconvey to the mortgagor.(w) The conveyance of land to a third person is not part performance where the evidence connecting it with the contract in suit is in dispute and not satisfactory.(x)

In a case which came before the House of Lords, a memorandum was prepared but not signed for a marriage settlement, and changes were afterwards made by parol and a draft of a deed was prepared representing the final agreement. The lady's parent, though satisfied with these, wished them approved by an adviser; the latter approved, but before the parent knew of this, the latter died; it was held that the contract was not complete, and that therefore the part performance did not avail; this part performance consisted of a settlement made by the son-in-law (Lord Glengall) in pursuance of the agreement, and a conveyance to trustees by the daughter before her marriage.(y)

(r) *Kelly v. Walsh*, L. R. 1 Irel. 282.

(s) *Farwell v. Johnston*, 34 Mich. 343.

(t) *Parker v. Smith*, 1 Coll., Ch. 623; see a somewhat similar case, *Sweeney v. O'Hara*, 43 Ia. 36.

(u) *Van Duyne v. Vreeland*, 1 Beasley, 150; 2 Stockt., Ch. 378.

(v) *Graham v. Theis*, 47 Ga. 483.

(w) *Morrill v. Cooper*, 65 Barb. 516;

see *Pearson v. East*, 36 Ind. 29.

(x) *Force v. Dutcher*, 18 N. J. 402.

(y) *Thynne v. Lord Glengall*, 2 Cl. & Fin. N. S. 157; 2 H. L. C. 94; S. C. before M. R., 1 Keene, 769.

§ 597. The tender by the vendor of a deed is insufficient part performance to give a right to the purchase-money.(z) Though with tender of possession.(a) Where a deed is executed by a trustee, who can only demise with the written assent of the *cestui que trust*, and is also executed by the *cestui que trust*, it is not binding if, before it is accepted, the latter countermands the deed.(b) Where a lessee took possession of the premises, wrote a letter acknowledging herself as tenant, and retained the copy of the agreement of lease executed by the lessor, she was held to be bound notwithstanding she had executed no writing.(c)

Where the deed is accepted, we have the case rather of full performance than of part performance; a doctrine which stands on a basis of its own, and which is treated of in another chapter.(d) Where the transaction is one in the nature of an exchange, or where part of the consideration is itself land, the tender and acceptance of a deed for the land which the claim was to convey is part performance of the whole contract.(e) The conveyance of part of land orally sold, with a promise to convey the rest when the promissor has title, is insufficient part performance to take the residue out of the Statute of Frauds.(f) That one of the parties to a contract to make mutual wills, makes his will, is not part performance, because the will is revocable.(g)

An agreement between the vendee under an oral sale and a tenant of the vendor is not an attornment, and will not be sufficient part performance.(h) Where the vendor's tenant attorned to the vendee but paid the rent to the vendor and finally gave up possession to the latter, the part performance is insufficient.(i) Part per-

(z) *Norris v. Lain*, 16 Johns. 151; *Graham v. Theis*, 47 Ga. 479; *Wilson v. Clarke*, 1 W. & S. 556; *King v. Smith*, 33 Vt. 25; *Lowther v. Carill*, 1 Vern. 221, pl. 220.

(a) *Reeves v. Pye*, 1 Cranch, C. C. 220. See *Sands v. Arthur*, 84 Pa. St. 479.

(b) *Phillips v. Edwards*, 33 Beav. 441.

(c) *Gaston v. Frankum*, 2 DeG. & Sm. 567.

(d) See *Farrar v. Patton*, 20 Mo. 84; *Hodges v. Howard*, 5 R. I. 149.

(e) *Farrar v. Patton*; *Hodges v. How-*

ard; *Maddox v. Rowe*, 23 Ga. 433; *Trayer v. Reeder*, 45 Ia. 273; *Eastburn v. Wheeler*, 23 Ind. 305.

(f) *Lowther v. Carill*, 1 Vern. 221. And part performance as to one tract is no part performance as to another separately sold; *Buckmaster v. Harrop*, 7 Ves. 344.

(g) *Gould v. Mansfield*, 103 Mass. 409.

(h) *Kurts v. Cummings*, 24 Pa. St. 35.

(i) *Brawdy v. Brawdy*, 7 Pa. St. 157.

formance by one who declares that he has only the use and who afterwards takes a lease and attorns is insufficient.(j)

§ 598. Marriage is not part performance of a contract in consideration thereof.(k) Renunciation of dower is insufficient to entitle to specific performance of a contract between husband and wife.(l) And gifts made by the wife of her property with her husband's permission are insufficient part performance, as, standing in such an intimate relation as that of the marital state, the wife's gifts may well have been the gifts of both.(m)

Marriage as part performance, and part performance of contracts between those married or about to marry.

A promise by a woman to one who afterwards married her that if he would do so and would go upon the land and improve it she would convey it to him, is not taken out of the Statute of Frauds by the marriage or the improvements; the land being his as husband and not as vendee, the improvements were to be referred to the former character.(n) Where one before marriage executes a bond making a certain marriage settlement, and both the husband and wife act under it, and after his death she continues to carry it out, it was held that her heir could not attack the bond on the ground that she has not signed it; this because one party having signed, both parties have acted thereunder, the Statute of Frauds does not apply.(o)

Where there was a letter addressed by the lady's father to the father of her proposed husband, saying, "I shall not give my daughter any fortune at present;" "I intend to give her for her own use £150 a year;" and a letter to the proposed husband to the same effect; the Statute of Frauds was complied with, though the lady's father said, the evening before the marriage, that he would revoke his consent; but the marriage took place, and payments of the annuity were afterwards made.(p) Where a wife joined her husband in selling her land, and the husband by an agreement with her buys for her and improves other land, a contract that if she will sell her land he will buy, improve, and convey

(j) Rankin v. Simpson, 19 Pa. St. 471.

(m) Finch v. Finch, 10 Ohio St.

(k) Crane v. Gough, 4 Md. 322; Finch v. Finch, 10 Ohio St. 505.

(n) Henry v. Henry, 27 Ohio St.

(l) Hall v. Hall, 2 McCord, Ch. 276

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(the court apparently thinking that there could be no part performance between husband and wife).

(o) Archer v. Pope, 2 Ves. Sr. 523.

(p) Sitger (*Ex parte*), Mont. 100.

to her other land, is sufficiently part-performed as against his heirs.(q)

Where, in a deed of separation, a husband bound himself to pay his wife an annuity, and afterwards at his request she returned to him upon his oral promise to continue the annuity and bind his estate for it; the oral promise was enforced on the ground of fraud and part performance.(r) Where a man about to marry a widow orally agreed with her that, upon his conveying to her children certain land which he bought from their trustee, he should be relieved from his liability upon a bond and mortgage given for the price of the land, the land then not being worth the mortgage, it was held, upon his having conveyed the land to the children, that the contract was good even against his creditors.(s)

§ 599. There are some instances of part performance which do not belong to any special category, and which may be noticed here. Thus a promise to give a mortgage fully performed by the plaintiff, and as to all but one item by the defendant, is not within the Statute of Frauds.(t)

Where the facts of the case show that a memorandum is not intended to contain all the contract, the execution of the memorandum and the fulfillment of its terms may be regarded as a part performance of the entire contract of which the writing formed a part.(u) For examples of insufficient part performance of a gift,(v) and of insufficient part performance generally,(w) and of sufficient part performance generally.(x)

- (q) *Gosden v. Tucker*, 6 Munf. 1. N. C. 7; *Simmons v. Hill*, 4 Harr. & McH. 252; *Nye v. Taggart*, 40 Vt. 295; (r) *Webster v. Webster*, 4 DeG. M. & G. 437; 1 Sm. & Giff. 491; 27 L. J. Ch. 115. *Wilson v. Ray*, 13 Ind. 6; *Whitridge v. Parkhurst*, 20 Md. 92; for examples of insufficient part performance. (s) *Credle v. Carrawan*, 64 N. Car. 425. (t) *Rowland v. Gorman*, 1 J. J. Marsh. 76; *Andrews v. Jones*, 10 Ala. 400; (u) *Swain v. Seamens*, 9 Wall. 254. 76; *Brown v. Bellows*, 4 Pick. 189; *Stone v. Dennison*, 13 Pick. 6; *Crane v. Gough*, 4 Md. 322; *Mushat v. Brevard*, 4 Dev. 76; *Voluntine v. Godfrey*, 9 Vt. 190; (v) *McKowen v. McDonald*, 43 Pa. St. 441. *Irwin v. Irwin*, 34 Pa. St. 525; *Niven v. Belknap*, 2 Johns. 587. (w) See *Overmeyer v. Koerner*, 2 W.

CHAPTER XXVII.

PART PERFORMANCE AS TO CHATTELS: TITLE ACQUIRED BY PART PERFORMANCE.

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| § 600. Part performance of contracts as to chattels.
§ 601. To whom part performance available.
§ 602. Nature of title acquired by part performance.
§ 603. The title how far good as against third person. | § 604. Such title subject to levy, taxation, &c.
§ 605. Such title assignable, &c.; how far subject to dower.
§ 606. General status of an equitable title acquired through part performance; and in regard to the Statute of Limitations. |
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§ 600. As will be seen in another place, the payment of earnest or the delivery and acceptance of any part of the chattels will, by the express terms of the statute, make an oral sale of chattels valid. This rule covers, of course, almost every application of the doctrine of part performance to the case of personalty. There are, however, a few examples of such application, which may be given here. Thus an agreement to buy back stock which formed a stipulation of a previous sale of it is partly performed by such original sale, and the Statute of Frauds was on this ground held not to apply to the contract for the repurchase.^(a) Where the plaintiff, under a parol agreement, bought stock in his own name on the joint account of himself and the defendant, and held it as security for the repayment to him by the defendant of the latter's share of the liability for the price, it was held that the Statute of Frauds, because of the part performance, did not apply.^(b)

Part performance of contracts as to chattels.

The purchase of goods to fill a store, and the execution of a bill of sale thereof, is part performance of an oral contract to let the store to the defendant and by the defendant to employ the plaintiff as clerk and to sell and deliver goods to him; and an action will lie for the plaintiff's services as clerk.^(c) A parol promise to take

(a) *Fay v. Wheeler*, 44 Vt. 293.

(b) *Stover v. Flack*, 41 Barb. 163.

(c) *Wentworth v. Buhler*, 2 E. D. Smith, 305.

certain shares of stock of a company, for which the vendee, the defendant, gave in payment a mortgage, which was deposited with the company and to become their property when the owner of the shares transferred them to the defendant, is not taken out of the Statute of Frauds by the giving of the mortgage, &c., as part performance or part payment, when the shares were not transferred to the vendee until they became worthless, when he refused them.(d)

§ 601. It is a question of no little difficulty to determine how far part performance of one party to the oral contract is available to the other. The stronger argument is in favor of holding that as the doctrine of part performance is not to be extended, and as a party part-performing who refuses to go on with his agreement loses at any rate the value of the improvements, &c., which he may have made, it is not expedient to take the further step of saying that an equitable claimant is bound by his own equity, or that a party who has done no part performance shall have the same rights as one who has. A recent decision says that part performance must be directly in prejudice of the party doing the act, who must himself be the party calling for the completion of the contract.(e) Part performance by the vendee will not avail the vendor.(f)

Where the defendant bought by parol the plaintiff's interest in certain land and undertook to pay the latter's mortgage notes relating to the property; and the plaintiff conveyed the land by quit-claim to the mortgagee, but by way of security merely; it was held that the plaintiff, upon paying part of the mortgage note could not recover over against the defendant, though the latter had had possession of the premises and had paid part of the mortgage indebtedness, if the defendant chose to relinquish the amount he had so paid, and to defend on the ground of the Statute of Frauds.(g) Where the defendant admitted that the plaintiff had executed a title-bond, and that he, the defendant, had made pay-

(d) *Southern Life &c. Co. v. Cole*, 4 *v. Rathbun*, 6 Barb. 98; *Payne v. Graves*, Flor. 366, 378. 5 Leigh, 565; *North v. Forest*, 15 Conn.

(e) *Williams v. Morris*, 95 U. S. S. C. 404; *Williston v. Williston*, 41 Barb. 457, citing cases. See also *Glass v. Hulbert*, 102 Mass. 33; *Brightman v. Hicks*, 648.

(f) *Buckmaster v. Harrop*, 7 Ves. 108 Mass. 246; *Johnson v. Hanson*, 6 Ala. 344; *Lockett v. Williamson*, 37 Mo. 388; 338.

(g) *Davis v. Farr*, 26 Vt. 592. *Watkins v. Rush*, 2 Lans. 234; *Rathbun*

ments, but denied that, as alleged in the bill, he had taken possession, the part performance was held insufficient; but it seems that if the defendant had taken possession, the plaintiff, the vendor, could have taken advantage of this.(h)

Where the defendant, the vendee of land, had done sufficient part performance to entitle himself to specific performance, the plaintiff, who refused a deed when asked for it, cannot afterwards tender it and sue for the purchase-money the defendant, who has in the interval repudiated the contract.(i) So where the purchaser of an equity of redemption undertook to pay the vendor's mortgage, and took possession, and the vendor conveyed the land as security to the mortgagee, the vendee, who had paid part of the mortgage, could, under the Statute of Frauds, repudiate the contract, if he gives up possession and relinquishes the right to recover what he has paid.(j)

Curiously enough, though part performance as a general principle is denied in Kentucky, yet in two cases in that State in which it has been allowed the claim sustained was the doubtful one of a vendor seeking to hold a vendee who had part-performed; the vendee in one of these cases had obtained indulgence by repeated renewals of his note for the price, and had not tendered back possession of the land; and in the other, had kept possession till pressed by executions for the price.(k) There is authority for holding that a vendor can avail himself of the vendee's part performance to bind the latter.(l)

Where there has been part performance by possession taken, and the vendee becomes bankrupt, the Statute of Frauds being satisfied the vendors can enforce their lien for the unpaid purchase-money.(m) Where land was sold and no memorandum was made because the land had been by mistake included in a deed to a third party, and the plaintiff, the vendor, delivered possession, which the

(h) *Townesley v. Charles*, 2 Grant, Ch. 315.

(i) *Eveleth v. Scribner*, 12 Me. 26.

(j) *Davis v. Farr*, 26 Vt. 592; see *Capehart v. Hale*, 6 W. Va. 558.

(k) *Hill v. Spalding*, 1 Duvall, 219; *Barnes v. Wise*, 3 T. B. Mon. 170.

(l) *Tatum v. Brooker*, 51 Mo. 148; *Smith v. Brailsford*, 1 Desaus. 350 (sem-

ble); *Wilson v. West Hartlepool R. R.*, 2 DeG. J. & S. 492; *Mayfield v. Wadley*, 3 B. & C. 361; 5 D. & R. 224 (semble); *Alderman v. Chester*, 34 Ga. 152 (semble); *Bowers v. Cator*, 4 Ves. Jr. 96 (semble).

(m) (*Ex parte*) *Cooper*, 3 M. D. & DeG. 719.

defendants took and followed by improvements, and the plaintiffs procured the third party to disclaim his title in the land; it was held that upon the defendants claiming the property as theirs the plaintiff could recover the price, though the Statute of Frauds was strongly insisted on in the defence.(n)

Where the vendee is given possession and the vendor goes to expense and trouble in making the title, or is prevented from making another sale, the part performance avails the vendor;(o) and it has been said that both parties partly perform, the one by the delivery, the other by the acceptance of possession.(p) Where the vendee of land partly performed under the oral contract, and there was written submission to arbitration to settle what the vendee owed the vendor, and an award in favor of the latter, who thereupon tendered a deed and demanded the amount stated in the award, the court ruled the defendant to comply with the award.(q)

That a lessee, the defendant, under an oral contract was in possession under the contract for two months, was considered a circumstance of part performance in favor of the plaintiff, because the plaintiff was deprived of his opportunity to rent.(r) And it has been expressly decided that both parties can avail themselves of part performance, but this often only means that a vendor can perform partly, and thereby recover as well as the vendee.(s) And this principle has been extended to the case of chattels.(t)

§ 602. The next point for consideration is the nature of the title acquired by part performance of an oral contract within the Statute of Frauds. The title of one part-performing is a complete equitable one.(u) One ejectment on a title under an oral sale with possession and acts of ownership is conclusive, the title being only equitable.(v) The title when the execution of the contract is decreed in chancery vests as between the parties at the time, not of the decree, but of the con-

Nature of title acquired by part performance.

(n) *Maxfield v. Bierbauer*, 8 Minn. 416.

(o) *Miller v. Hower*, 2 Rawle, 55.

(p) *Reed v. Reed*, 12 Pa. St. 117.

(q) *Imlay v. Wikoff*, 1 South. 132.

(r) *Steininger v. Williams*, 63 Ga. 476, citing cases. See Georgia Code, § 1951.

(s) *Pugh v. Good*, 3 W. & S. 56; *Keis-*

selbrack v. Livingston, 4 Johns. Ch. 147; *Gillespie v. Moon*, 2 id. 598; *Philpott v. Elliott*, 4 Md. Ch. Dec. 273; *Overstreet v. Rice*, 4 Bush, 3.

(t) *Hawley v. Keeler*, 53 N. Y. 114.

(u) *Shobe v. Carr*, 3 Munf. 10; *Snyder v. Martin*, 17 W. Va. 302.

(v) *Winpenny v. Winpenny*, 7 W. N. Cas. 114; 92 Pa. St. 441.

tract made.(w) An oral contract partly performed will give an insurable interest in land.(x)

A son who, under a verbal agreement with his father to take a farm, work it, and support the family and pay legacies, resides with his father fifteen years, has an equitable title in the farm which prevents his father excluding him from a certain room in the house.(y) Title under an oral agreement to enter and mine lands is good as against a trespasser, and he will have to account to the lessee for any ore taken.(z) The title is good as against a trespasser, being at least a license.(a)

A replication of entry under an oral purchase of land and payment of the price is a good answer to a plea of *liberum tenementum* in an action of trespass *quare clausum fregit*, the plaintiff having been entitled to a notice to quit.(b) And even where the vendee under the oral sale takes clay out of an open pit, he is not liable in tort for doing so, though he afterwards fails to fulfill his contract, as he is a licensee, and not a trespasser.(c) Where the vendee under an oral sale of land has taken possession, he cannot be made to pay for the use when the vendor rescinds.(d)

A title by part performance is as good against the heirs of the vendor as against the vendor himself(e) or devisees.(f) In Pennsylvania there are statutes recognizing the validity of oral contracts of sale made by a decedent, and partly performed, and providing for their specific enforcement against the heirs or representatives of the decedent.(g) Though a tenant in remainder is not bound by the part performance of a life tenant.(h) A remainder-man who does not know of an oral contract made by the holder of the lesser estate is not bound by any part performance, and if he knows

(w) Mactier v. Frith, 6 Wend. 112.

(x) White v. Home Ins. Co., 14 Low. Can. Jour. 302, citing cases.

(y) Langdon v. Guy, 12 N. Y. Week. Dig. 241.

(z) Ganter v. Atkinson, 35 Wis. 51.

(a) Yale v. Seely, 15 Vt. 230; Baker v. Hale, 6 Jere. Bart. 49.

(b) Hope v. Cason, 3 B. Mon. 545, citing cases.

(c) Beattie v. Connolly, 39 N. J. Law, 161, distinguishing Freeman v. Headley, 3 Vroom, 225, 4 id. 523, as a case

where the right to deal with the property was expressly conditioned upon the fulfillment of the contract.

(d) Malloy v. Lyons, 1 N. Y. Week. Dig. 369.

(e) Boggess v. Robinson, 5 W. Va. 413.

(f) Peters v. Jones, 35 Ia. 517.

(g) Rhodes v. Frick, 6 Watts, 317; Act March 10th, 1818, § 1, 7 Sm. 79; February 24th, 1834, § 18.

(h) Daly v. Coghlan, 3 Ir. Jur. N. S. 151; Lowry v. Lord Dufferin, 1 Ir. Eq. Rep. 281.

of the part performance itself, he will be justified in presuming it to be under a valid written agreement.(i)

§ 603. The equitable title by part performance is good as against third persons with notice.(j) The notice may be actual or constructive.(k) Entry into possession by a vendee who paid the price, and made improvements, is notice of his equity to a subsequent mortgagee.(l) And where a person is in possession of the land a purchaser is put upon notice not merely of a legal title, but even of an equitable one (it seems, within the Statute of Frauds).(m) Where a mortgagor knew of the equitable assignment of a mortgage, he cannot pay the assignor to the detriment of the assignee, and, though there appears no written assignment, the court will presume a power of attorney under seal by the assignor to the assignee, enabling the former to act for the latter.(n)

Whether or not payment of price and taking possession by the vendee, who bought land from the trustees of a religious society incorporated, will give an estate in land, possession was notice of such right, whatever it might be, to all parties dealing with the land, *e. g.*, a mortgagee, and a purchaser at the foreclosure sale, &c.(o) The title by part performance is good as against the judgment creditors of the vendor, and possession had before the judgment obtained is notice.(p) Where one party to an oral exchange of land has part-performed by buying the land he was to give, a preliminary injunction will issue to stop the sale by the other party of his the latter's land to a third person.(q) One who has taken

(i) *Blore v. Sutton*, 3 Meriv. 245.

(j) *Butcher v. Stapely*, 1 Vern. 363; 1 Eq. Ca. Ab. p. 21, pl. 9; *Brewer v. Brewer*, 19 Ala. 488; *Blunt v. Tomlin*, 27 Ill. 93; *Deniston v. Hoagland*, 67 Ill. 268; *Moreland v. Lemasters*, 4 Blackf. 385; *Higbee v. Moore*, 66 Ind. 264; *Renwick v. Bancroft*, 9 Nor. West. Rep. 368 (S. C. Ia.); *Farrar v. Patton*, 20 Mo. 84; *Dickerson v. Christman*, 28 Mo. 140; *Casler v. Thompson*, 3 Green, Ch. (N. J.) 61; *Downing v. Risley*, 2 McCarter, 96; *Massey v. M'Ilwain*, 2 Hill, Ch. 426; *Billington v. Welch*, 5 Binn. 132; *Farley v. Stokes*, 1 Pars. Eq. 423;

Jamison v. Dimock, 11 Pittsb. L. J. N. S. 56, 95 Pa. St. 52.

(k) *Merithew v. Andrews*, 44 Barb. 206; *Rhea v. Allison*, 3 Head, 178.

(l) *Humphrey v. Moore*, 17 Ia. 194; see *Baldwin v. Thompson*, 15 id. 507; *Rice v. O'Connor*, 12 Ir. Ch. 433.

(m) *Johnston v. Glancy*, 4 Blackf. 99; *Hanley v. Blackford*, 1 Dana, 1.

(n) *Cutler v. Haven*, 8 Pick. 490.

(o) *De Ruyter v. St. Peter's Church*, 2 Barb. Ch. 558.

(p) *Seager v. Burns*, 4 Minn. 147.

(q) *Curtis v. (Marquis of) Buckingham*, 3 V. & B. 168.

possession and improved the land under a parol sale is not a mere volunteer.(r)

§ 604. An equitable title by part performance is subject to levy and sale.(s) An interest of a vendee in possession of land under an oral contract, though a mere tenancy at will or by sufferance, is liable to execution.(t) The lien of a judgment in Pennsylvania not extending to land acquired after the judgment, it was held that as between two creditors, one of whom had obtained a judgment before the debtor had received a deed of the land in question, but after the oral contract of sale thereof had been made and partly performed, and the other of whom obtained judgment after the deed, it was held that the proceeds of the land which had been sold under an execution should be awarded to the former.(u)

Such title
subject to
levy, taxa-
tion, &c.

Where, between a parol sale of land acted upon by part payment, possession taken and improvements made, and its consummation by deed, a judgment against the vendor is entered, it does not affect the vendee's title.(v) Where a vendee (in this case under an oral exchange of land) makes ample part performance, the land is not bound by a judgment against the vendor.(w) The right to sue for the specific performance of an oral contract partly performed passes to the assignee in bankruptcy.(x) Where a vendee under an oral sale converts timber on the land into personalty by severing it, the latter will be liable to execution for his debts.(y)

Where the price has been paid and possession taken of the land, the latter is not bound by a judgment against the vendor; and this, though the judgment would have bound had there been a written contract which was not recorded.(z) Where adjoining land is bought by parol for the purpose of adding it to the homestead right, and possession is taken and improvements made, and then a debt is contracted and afterwards a conveyance is made of the land; the latter is exempt from execution on such subsequent

(r) *Hendricks v. Snediker*, 30 Tex. 305.

(s) *Neef v. Seely*, 49 Mo. 211; *Richmond v. Foote*, 3 Lans. 244; *Henderson v. Hoke*, 1 Dev. & Bat. Eq. 119; *Pugh v. Good*, 3 W. & S. 57; *Miller v. Specht*, 11 Pa. St. 455.

(t) *Talbot v. Chamberlin*, 3 Paige, Ch. 221.

(u) *Pugh v. Good*, 1 W. & S. 58.

(v) *Patton v. Borough of Hollidaysburg*, 40 Pa. St. 208.

(w) *Armstrong v. Fearnaw*, 67 Ind. 433.

(x) *Rea v. Richards*, 56 Ala. 396.

(y) *Pike v. Morey*, 32 Vt. 37.

(z) *Young v. Devries*, 31 Gratt. 309.

debt.(a) Where the vendee has paid purchase-money and had possession for ten years, but the vendor would not give a deed with the proper joinder of his wife, it was held that the vendor had the bare legal title but no attachable interest in the land.(b)

A judgment creditor of the vendee cannot be subrogated to the latter's rights so as to compel the vendor on the ground of part performance to make a conveyance, unless the vendee joins in the application.(c) It has been doubted whether this title is subject to execution.(d) In California it has been held that the possessory right to a mining claim is subject to taxation.(e)

§ 605. The equitable interest acquired by part performance is assignable;(f) can be mortgaged;(g) can be devised.(h) Such title assignable, &c.; how far subject to dower. The lease of a lessee who has part-performed is an asset of his estate.(i)

As has been seen, the title by part performance is good against the heir of him who is sought to be charged; it also can be availed of by the heir of the person who has part-performed.(j) Such a title is not good for all purposes, and there is authority for considering it insufficient to give dower, and even curtesy rights. Thus a parol sale of land, though followed by payment and possession, does not oust the widow's dower; the husband was owner at the time of his death so far as to establish dower.(k)

It has been held in Wisconsin that, contrary to the rule elsewhere, the widow of one who, before marriage, having orally contracted to sell land, had fulfilled his agreement after marriage, has dower in the land; but if there had been part performance by the vendee before the marriage the rule would be otherwise.(l) And where a husband under an oral sale had entered, made improvements, and paid part of the purchase-money, there is no dower in his widow, as he

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| (a) <i>Fyffe v. Beers</i> , 18 Ia. 11. | <i>Mun.</i> 98; <i>Rex v. Llantillio</i> , 5 B. & C. 463; 8 D. & R. 320; <i>Rice v. O'Connor</i> , 12 Ir. Ch. 433; <i>Thomson v. Scott</i> , 1 McCord, Ch. 37. |
| (b) <i>Hicks v. Riddick</i> , 28 Gratt. 421. | |
| (c) <i>Logan v. Hale</i> , 42 Cal. 645. | |
| (d) <i>Richards v. McKee</i> , 1 Harp. Eq. 195. | (i) <i>Green v. Green</i> , 2 Redf. 410. |
| (e) <i>People v. Shearer</i> , 30 Cal. 655. | (j) <i>Wilkinson v. Wilkinson</i> , 1 Des. Ch. 201. |
| (f) <i>Keys v. Test</i> , 33 Ill. 319; <i>Owen v. Frink</i> , 24 Cal. 175. | (k) <i>Williams v. Dawson</i> , 3 Sneed, 317. |
| (g) <i>White v. Butt</i> , 32 Ia. 344. | (l) <i>Madigan v. Walsh</i> , 22 Wis. 505. |
| (h) <i>Rowton v. Rowton</i> , 1 Hen. & | |

had not even a complete equitable title, the purchase-money not being all paid.(m) Where, however, a feme sole sold land orally, received the price and gave possession, and married, there was not such seisin in her as would give curtesy to her husband.(n)

In a Virginia case it was thought that a widow had dower in a partly-performed oral sale to her husband.(o) Where the plaintiff, the vendee under an oral sale of land, had partly performed, and the vendor and his wife conveyed to S., a third person, who reconveyed to the wife, it was held that S. had no title, and that the plaintiff held the land subject to the dower of the vendor's wife; the renunciation of dower in the deed to S. being ineffectual, even against the wife herself.(p)

Where a parol sale was made to the plaintiff of one acre of land, the price paid, and possession taken and improvements made; afterwards there was a life lease made by the same vendor of fifty acres, including the one; then a bond for the one acre to the plaintiff's wife; then a deed of the fifty acres to the life lessee. It was held that the parol agreement was merged in the bond, and therefore the wife alone must sue, relying on the bond.(q)

A vendee under a written contract, who is to pay the price in two installments and to take possession after paying one, had no sufficient equitable estate to give settlement, though he took possession, the second installment not having been paid, and no conveyance having been executed.(r) Where, under an oral promise that she should reconvey a life estate to him, a husband conveys land to his wife and remains in possession, he has, through part performance, so it was held in New York, an insurable interest.(s)

(m) *Lane v. Courtney*, 1 Heisk. 331.

(n) *Welch v. Chandler*, 13 B. Mon. 429.

(o) *Rowton v. Rowton*, 1 H. & Mun. 98.

(p) *Jefferson v. Jefferson*, 96 Ill. 559.

(q) *McCrumm v. Crawford*, 9 Grant, Ch. 340.

(r) *Rex v. Geddington*, 2 B. & C. 133.

(s) *Redfield v. Holland & Co. Ins. Co.* 56 N. Y. 357.

A parol contract taken out of the Statute of Frauds by part performance is not, however, within the recording acts, which only apply to a writing;

such a vendee is not obliged to put evidence of his position upon record, and a subsequent vendee without notice, on the other hand, is not affected by such parol sale; it was thought by the court that as to constitute part performance there must be notorious possession, the latter took the place of a writing; and the recording acts were only intended to protect against the wrong done by secret written transfers, unaccompanied by possession or other actual notice; *Floyd v. Harding*, 28 Gratt. 403.

Where a vendee by parol partly per-

§ 606. An equitable title by part performance is a valuable consideration for an express promise to pay the price, such as a note.^(t) And if there is no part performance the oral contract is not such consideration.^(u) Even an oral guaranty (the Statute of Frauds not applying to guaranties in Pennsylvania at the date of the decision) of the payment of the price of the land, is sufficiently supported by the consideration which arises out of part performance.^(v) Equitable interests as a general rule are within the Statute of Frauds, and can be divested only in accordance therewith.^(w)

Permanent buildings put on land by one in possession under an oral agreement to buy, are realty.^(x) Possession of land delivered and long enjoyed under a sealed contract was thought, in a Pennsylvania case, to amount to an actual demise, and to create a title which cannot be rescinded by parol.^(y) One in possession under a parol purchase is entitled, it has been said, to notice to quit, and trespass will lie against the vendor who disturbs his possession.^(z) An oral sale of land made, possession and a mortgage being given, cannot be rescinded unless the plaintiff shows part performance on his part.^(a)

A vendee under an oral sale, who had possession of land and made improvements many times the value of the land, is not liable to an ejectment though after several requests he has failed to pay the purchase-money; it seems that the proper action is for the money.^(b) In Michigan a different rule prevails, and where the party partly-performing has failed to pay the purchase-money, a notice to quit in fourteen days served on the tenant, the principal being out of the State, will work a forfeiture of the equitable right accruing through the part performance.^(c) Where the parties agree

formed, but afterwards his wife took a bond for the land, it was held that as this bond took the place of the parol contract and could be registered, a purchaser subsequently of the whole tract with knowledge of the parol contract, but not of the bond, was not affected by either title; *McCrumm v. Crawford*, 9 Grant, Ch. 340.

(t) *Ott v. Garland*, 7 Mo. 23; *McGowan v. West*, Id. 570; *Gillespie v. Battle*, 15 Ala. 276; *Curnutt v. Roberts*, 11 B. Mon. 42; *Edelin v. Clarkson*, 3 B. Mon. 31; *McDowel v. Delap*, 2 A. K. Marsh, 33.

(u) *Farnham v. O'Brien*, 22 Ma. 482.

(v) *Folmer v. Dale*, 9 Pa. St. 83.

(w) *Kelley v. Stanbery*, 13 Ohio, 408.

(x) *Poor v. Oakman*, 104 Mass. 316.

(y) *Garver v. McNulty*, 39 Pa. St. 485.

(z) *Hope v. Cason*, 3 B. Mon. 545.

(a) *Kelley v. Stanbery*, 13 Ohio, 408.

(b) *Holcomb v. Dowell*, 15 Kan. 382.

(c) *Hogsett v. Ellis*, 17 Mich. 362.

that if the vendee will surrender possession the vendor will allow him his improvements, in this case a crop planted, and the vendee surrenders; it was held, in an early Indiana case, that an action lay for the crop which was out and taken by the vendee.(d) Where possession is taken and rent paid, the lessee cannot abandon so as to escape rent, unless he can complain of the failure of the lessor to give a written lease.(e)

The position in which the title by part performance stands in relation to the adverse title which will satisfy the Statute of Limitations, is not without interest. A just distinction is made in a Florida case, as follows:(f) "An adverse possession must be inconsistent with the title of the claimant. If, on an agreement to sell lands, the consideration is paid and the owner consents that the buyer may enter and hold the land as his own, the entry and possession of the buyer cannot be deemed subordinate to the title of the seller, but as adverse and as a disseisin. But the case is different where one agrees to buy and another agrees to sell land, and the consideration is not paid, and the party contracting to buy enters into possession; inasmuch as the fair inference then is, that the entry and possession are in subordination to the title of the party contracting to sell until the stipulated payment is made. Such a case therefore constituted a tenancy at will or a trust rather than a disseisin."

Where one goes into possession under a verbal contract to purchase land, and, upon being notified that the contract is invalid, claimed compensation for improvements, it was held that his possession was not adverse, though he was not a tenant entitled to notice to quit.(g) Where an alleged donee has held possession of land claiming as owner for twenty-one years during the donor's lifetime, his title by lapse of time is good, and evidence of the original parol gift is for the jury, as showing that the donee claimed as owner, and what was claimed or understood by the donor is unimportant; the question is what did the donee claim.(h) So, the

(d) *Jarvis v. Sutton*, 3 Ind. 289.(g) *McClanahan v. Barrow*, 27 Miss.(e) *Grant v. Ramsey*, 7 Ohio St. 671.157; see *Ungley v. Ungley*, 5 Ch. D. 890; 25 W. R. 734.(h) *Campbell v. Braden*, 9 W. N. Cas. 488, 96 Pa. St. 388.(f) *Hart v. Bostwick*, 14 Flor. 173, citing cases.

holding of a child under an oral gift, to establish title against a vendee of the donor, must be notorious and adverse.(i)

A tenant in possession under an oral lease for more than three years, though entitled to specific performance on the ground of part performance, is not affected by a statute relating to tithes (2 & 3 Will. IV. c. 119, § 15), as holding a greater interest than a tenancy from year to year.(j) A parol agreement, though one which the court of equity would enforce for part performance, is not within 49 Geo. III. c. 121, § 19, which allows a bankrupt lessee to apply to the Chancellor for an order upon the assignees in bankruptcy to accept the lease or give it up, and which relieves the lessee bankrupt from liability on account of said lease.(k)

(i) *Hawkins v. Hudson*, 45 Ala. 494.

(k) *Ex parte Sutton*, 2 Rose, 86.

(j) *Orpen v. Moore*, 2 Jones (Irish), 442.

CHAPTER XXVIII.

COMPENSATION FOR ACTS OF PART PERFORMANCE.

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| <p>§ 607. Party rescinding must give compensation.</p> <p>§ 608. Who may claim compensation.</p> <p>§ 609. The rule in equity and at law.</p> <p>§ 610. The question as to who rescinds; mutual rescission.</p> <p>§ 611. Compensation from a vendor who will not or cannot convey.</p> <p>§ 612. When vendor does not perform, the vendee's rescission is not strictly such.</p> <p>§ 613. When vendor will not perform, there is no compensation.</p> <p>§ 614. Vendee must before suit have made his claim. Other cases where no compensation can be had.</p> <p>§ 615. The general rule applies to chattels; <i>Sweet v. Lee</i>.</p> <p>§ 616. The claimant must not be in default.</p> <p>§ 617. General rule denied (see § 620).</p> <p>§ 618. How far the vendor, by accepting the vendee's rescission, may waive the latter's default, and has ground for recovery of compensation.</p> <p>§ 619. Whether vendor can recover for</p> | <p>use, &c., against a vendee willing to go on.</p> <p>§ 620. The general rule denying compensation to a vendee in default, relaxed or denied (see § 617).</p> <p>§ 621. Other cases in which no compensation can be recovered.</p> <p>§ 622. Compensation for services.</p> <p>§ 623. The nature of suit for compensation. <i>Quantum meruit</i>. How far the special contract admissible in evidence.</p> <p>§ 624. Contracts falling within year clause. Rule of compensation.</p> <p>§ 625. Further as to the common counts.</p> <p>§ 626. The recovery in equity. How far a lien is given.</p> <p>§ 627. How far trover and detinue lie.</p> <p>§ 628. Measure of damages—money paid.</p> <p>§ 629. Value of labor bestowed; of improvements.</p> <p>§ 630. No recovery for loss of bargain.</p> <p>§ 631. Set-off and mutual claims as to compensation.</p> |
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§ 607. WHERE for any reason the part performance does not suffice to justify a court in decreeing specific execution of the contract, compensation will be ordered; that is to say, the party rescinding must pay for the benefits which have from the part performance enured to him.^(a) A party rescinding a contract on the ground of fraud

Party rescinding must give compensation.

(a) *Pulbrook v. Lawes*, 1 Q. B. D. 288; 45 L. J. Q. B. 179; *Pinckard Annable*, 4 Conn. 354; *Warner v. Hale*, v. *Pinckard*, 23 Ala. 650 (not decided); 65 Ill. 396; *Parker v. Bodley*, 4 Bibb,

must restore what he has received to the other party and put the latter *in statu quo*.(b) In a Wisconsin case the court said: "The cases have been carefully examined, and we think the rule may fairly be deduced from them, that where money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto otherwise capable of contracting to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received."(c) After rescission by the defendant there is a failure of the consideration, and what the plaintiff has expended he can recover.(d)

Where an oral vendee refuses a deed, renounces the contract, and abandons possession, he is liable for use and occupation.(e) And even where the oral contract is regarded as entirely void, a vendor cannot evict the vendee till he has repaid the latter the price paid and compensated him for improvements made.(f)

Where a vendor cannot make title the vendee can recover his betterments or improvements, and this as a general rule apart from any consideration of the Statute of Frauds.(g) By statute in

103; *Hambell v. Hamilton*, 3 Dana, 501; *Maderia v. Hopkins*, 12 B. Mon. 604; *Seymour v. Bennet*, 14 Mass. 268; *Dix v. Marcy*, 116 Mass. 417; *Parker v. Tainter*, 123 Mass. 186; *Plummer v. Buckman*, 55 Me. 106; *Mackubin v. Clarkson*, 5 Minn. 253; *Beaman v. Buck*, 9 Sm. & M. 210; *Parker v. Niggeman*, 6 Mo. App. 547, citing cases; *Smith v. Smith*, 4 Dutch. 217; *Broadwell v. Getman*, 2 Denio, 87; *Lockwood v. Barnes*, 3 Hill, 130; *Wood v. Shultis*, 6 Thompson & Cook, 558; *Rosepaugh v. Vredenburg*, 23 N. Y. Sup. Ct. 63; *Ryan v. Dox*, 34 N. Y. 313; *Galvin v. Prentice*, 45 N. Y. 162; *Day v. N. Y. R. R.*, 51 N. Y. 590; *Moody v. Smith*, 70 N. Y. 598; *Love v. Neilson*, 1 Jones, Eq. 339; *Dunn v. Moore*, 3 Ired. Eq. 367; *Chambers v.*

Massey, 7 Ired. Eq. 286; *Barnes v. Brown*, 71 N. Car. 510; *Hilton v. Duncan*, 1 Coldw. 318 (considering authorities); *Ridley v. McNairy*, 2 Humph. 177; *Cripps v. Bearden*, 5 Humph. 129; *Sheid v. Stampe*, 2 Sneed, 175; *Rainer v. Huddleston*, 4 Heisk. 226.

(b) *Shepherd v. Fish*, 17 Ind. 230.

(c) *Northwestern &c. Packet Co. v. Shaw*, 37 Wis. 661.

(d) *Rickard v. Stanton*, 16 Wend. 26; *Davis v. Strobbridge*, 44 Mich. 159.

(e) *Davidson v. Ernest*, 7 Ala. 819.

(f) *Daniel v. Crumpler*, 75 N. Car. 186.

(g) *Ewing v. Handley*, 4 Litt. Sel. Cas. 371; see *Geoghegan v. Ditto*, 2 Metc. (Ky.) 436; see *Pope v. Whitehead*, 68 N. Car. 198 (citing Acts 1871-2, c. 147), and the rule of betterments

Kansas contracts with school teachers must be in writing, but one engaged by parol can recover for reasonable value.(h) Compensation may be allowed when the contract is too uncertain to be enforced.(i) The principle is not peculiar to the Statute of Frauds; and is a general one under probably all systems of law.(j) And improvements on land pending a negotiation, though not part performance because not under a concluded contract, may yet call for compensation as being at the request of the vendor.(k)

Where the defendant let the plaintiff, a company of which he was a stockholder, enter upon his land and make valuable improvements, without taking any steps to have his damages settled, &c., the plaintiff company were entitled to compensation.(l) It is applied under the act of Congress requiring written evidence to prove contracts made with the United States through the officers of the latter.(m) So, by special statutes in Kentucky relating to occupation of lands made under an adverse claim.(n)

§ 608. A vendee part-performing will not be enjoined from removing his improvements, the vendor having rescinded.(o) So a payment made to one who has bought land under a promise to hold for another and who refuses to carry out the oral trust, may be recovered.(p) And even where a vendor has, by a written contract of sale of land, reserved the right to rescind for failure within a certain time to pay the purchase-money, he must, when so rescinding, reimburse the vendee for improvements made.(q) The proceeds of a note, delivered to one of the parties to an oral exchange of land, collected by him, can be recovered by the other party, because, the exchange being invalid, the transaction is without consideration.(r) Money

Who may
claim com-
pensation.

said to be a peculiarly American one; see *Milwaukee &c. R. R. v. Kellogg*, 17 Amer. R. W. (Ladd), 311; 4 Otto, 469; see 14 U. S. Dig. 1st Ser. 123.

(h) *Jones v. School District*, 8 Kan. 364.

(i) *Anthony v. Leftwich*, 3 Rand. 244.

(j) *Bright v. Boyd*, 1 Story, 494, citing the Roman law; *Mumford v. McKinnie*, 21 La. Ann. 547; *Harper's Appeal*, 64 Pa. St. 321; see *Daniel v. Crumpler*, *supra*.

(k) *Congdon v. Darcy*, 46 Vt. 493.

(l) *Trenton Water Co. v. Chambers*, 1 Stockt. 475.

(m) *Clark v. United States*, 95 U. S. 541; Act June 2d, 1862.

(n) *Young v. Pate*, 3 J. J. Marsh. 101.

(o) *Hamilton v. Rook*, 62 Ill. 139.

(p) *Duncan v. Laurence*, 24 Pa. St. 157.

(q) *Humphreys v. Holtsinger*, 3 Sneed. 229; see also *Bellamy v. Ragsdale*, 14 B. Mon. 366.

(r) *Rice v. Peet*, 15 Johns. 503.

forfeited if the oral contract is not performed cannot be recovered.^(s)

An express oral contract to repay the purchase-money if the title to the land fails, is *a fortiori* good.^(t) So such promise to pay for improvements.^(u) Where the vendor of land orally sold administers the vendee's estate, he must in his account as administrator charge himself with the amount of the price received by him from the intestate.^(v) A lessee partly performing, as by repairing, is entitled to compensation.^(w) Before the Statute of Frauds the same rule obtained, and a lessor could not disturb the lessee under an oral lease while getting in his crop.^(x) And the tenant who enters under an oral contract and who afterwards refuses a written lease is liable for use and occupation.^(y)

Where the defendant, a tenant bound to repair, and who has allowed the property to get out of repair, promises the plaintiff that if the latter will repair he the defendant will assign his lease to him, the latter can recover his expenditures if the defendant refuses to make the assignment.^(z) Even where the tenant holds adversely, he is in Alabama under some circumstances entitled to be reimbursed for his improvements.^(a) So a license cannot be revoked without reimbursement.^(b) As where the licensee is entitled to a standing crop sown by him ;^(c) or, it seems, to buildings put by him upon the land.^(d)

Where a partner under a verbal agreement within the Statute of Frauds has in performance of the contract received moneys for years, he must account for these notwithstanding the Statute of Frauds—it is a case of trust.^(e) Where an oral gift of land, as from a parent to his child, is revoked by the former, he must give compensation for part performance.^(f) The right to compensation has been considered so well defined a thing that it is capable of assignment.^(g)

(s) Goodrich v. Nichols, 2 Root, 498.

(t) Thayer v. Viles, 23 Vt. 497.

(u) Moore v. Ross, 11 N. H. 547.

(v) Webb v. Webb, 6 Mon. 166.

(w) White v. Wieland, 109 Mass. 291.

(x) Harrison v. Chomely, Cary, 72

(Anno 3 Eliz.)

(y) Little v. Martin, 3 Wend. 219.

(s) Gray v. Hill, Ry. & Mood. 420.

(a) Cassell v. Collins, 23 Ala. 679.

(b) Dillion v. Crook, 11 Bush. 325.

(c) Harris v. Frink, 49 N. Y. 27, citing

cases; see Moore v. Ross, 11 N. H. 547.

(d) Wells v. Bannister, 4 Mass. 514.

See "License."

(e) Gates v. Fraser, 6 Bradw. 232.

(f) Hamilton v. Hamilton, 5 Litt. 29.

(g) Lombard v. Ruggles, 9 Ma. 67.

Where a wife, in consideration of receiving certain land, agreed orally with her husband to give up her separate estate, she is entitled to make her claim against him for compensation, in the character of a general creditor.(h) Compensation for goods assigned under an invalid oral contract is recoverable at law but not usually so in equity.(i) When the performance by one party has been complete of his part, compensation will, *a fortiori*, be given.(j)

§ 609. An entry in Freeman is as follows: "a contract for land by parol and a great part of the money paid is evidence in the Statute of Frauds, but the party that paid the money, or his executors, may by equity recover back the money: and said that 'As to this, I saw Sir W. Jones' opinion under his hand.'" See note citing cases, and saying that now at law also there might be recovery.(k) The rule of compensation applies both in equity and at law.(l) Where there is ground for specific performance, but whether because of the Statute of Frauds or for any other reason this is impossible, equity will decree compensation in a proper case.(m) It has been said, indeed, that where compensation would be adequate specific performance will be refused; but compensation by damages at law is probably here meant.(n)

Where no action will lie at law, equity will entertain a bill for compensation.(o) Whether compensation will be given in equity

- (h) *Bowie v. Stonestreet*, 6 Md. 418.
- (i) *Sims v. McEwen*, 27 Ala. 192, citing *Denton v. Stewart*, 1 Cox, 258.
- (j) *Bowie v. Stonestreet*, 6 Md. 418.
- (k) *Anon.*, *Freem. K. B.* 486.
- (l) *Phillips v. Thompson*, 1 Johns. Ch. 145; *Force v. Dutcher*, 3 C. E. Green, 401; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Dunn v. Moore*, 3 Ired. Eq. 364; *Thompson v. Mason*, 4 Bibb, 196; *Renkin v. Hill*, 49 Ia. 271; *Fox v. Longley*, 1 A. K. Marsh. 388.
- (m) *Denton v. Stewart*, 1 Cox, 258; *Goodwin v. Lyon*, 4 Port. (Ala.), 297; *Maddera v. Smith*, 3 Stew. 122; *Mialhi v. Lassabe*, 4 Ala. 712; *Johnston v. Glancy*, 4 Blackf. 99; *Worth v. Worth*, 84 Ill. 442; *McCracken v. Sanders*, 4 Bibb, 511; *McC Campbell v. McC Campbell*, 5 Litt. 92; *Patterson v. Yeaton*, 47 Me. 315; *Bowie v. Stonestreet*, 6 Md. 418; *Eakle v. Eakle*, cited in *Green v. Drummond*, 31 Md. 86; *McNamee v. Withers*, 37 Md. 177; *St. Paul Division v. Brown*, 9 Minn. 162; *Gupton v. Gupton*, 47 Mo. 46; *Force v. Dutcher*, 3 C. E. Green, 401; *Gibert v. Peteler*, 38 N. Y. 170; *Dunn v. Moore*, 3 Ired. Eq. 364; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *McKowen v. McDonald*, 43 Pa. St. 441; *Hilton v. Duncan*, 1 Cold. 318; *Boze v. Davis*, 14 Tex. 334; see *Pasch. Tex. Dig.* § 7871; *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1; *West Virginia Land Co. v. Vinal*, 14 W. Va. 686.
- (n) *Overmyer v. Koerner*, 2 W. N. C. 7 (S. C. Pa.)
- (o) *Jervis v. Smith*, *Hoff. Ch. Rep.* 472.

where specific performance can be decreed, is not altogether clear.(p) But it has been said that where a contract relating to land is performed on one side, either specific performance or compensation will be decreed.(q) The court will exercise its discretion as to specific performance as well in the case of an oral contract within the Statute of Frauds part-performed, as in any other case.(r)

Equity having taken jurisdiction to give specific performance, can give damages when the evidence showed that the land had been sold to a *bona fide* vendee without notice.(s) Where the plaintiff brought a bill for a dissolution of the partnership and for an account, and the bill claimed to alone hold a certain lease and to the defendant's claim to a share, set up the Statute of Frauds. The court, taking the defendant's answer for the cross-bill which he should have filed, held the plaintiff's defence sufficient, but gave the defendant compensation for his expenditures.(t)

It has been thought that the remedy at law is necessarily inadequate, and therefore equity will give compensation.(u) It has been held in Kentucky that while compensation can be had in equity, no action therefor lies at law.(v) In the case of improvements the compensation was said to be not for work, &c., at law, but in equity for the increased value of the land.(w)

An uncertainty in the terms of the agreement is an instance in which specific performance must be refused, and yet where compensation may be granted.(x) So, where a purchase of land was made and part of the latter was not conveyed though all the price was paid, and the vendor refused to convey the omitted portion, the vendee was not allowed at law to recover the value of the latter tract; but as the contract was entire, was directed to resort to equity.(y) In such a case that there is no remedy at law is a further reason for equitable relief.(z)

(p) *Scott v. Bush*, 26 Mich. 421; *North v. North*, 9 Chic. Leg. N. (S. C. Ill.), 396.

(q) *Cady v. Caldwell*, 5 Day, 67; *Pengall (Lord) v. Ross*, 2 Eq. Ca. Abr. 46.

(r) *West Virginia Land Co. v. Vinal*, 14 W. Va. 686.

(s) *Renkin v. Hill*, 49 Ia. 271.

(t) *Burdon v. Barkus*, 4 DeG. F. & J. 47.

(u) *Id.* 691; see *Phillips v. Thompson*, 1 Johns. Ch. 145.

(v) *Shreve v. Grimes*, 4 Litt. 223; *Orear v. Botts*, 3 B. Mon. 360.

(w) *Mathews v. Davis*, 6 Humphr. 327.

(x) *Newton v. Swazey*, 8 N. H. 13; *Ackerman v. Ackerman*, 24 N. J. Eq. 316; *McNamee v. Withers*, 37 Md. 177; *Aday v. Echols*, 18 Ala. 357.

(y) *Way v. Cutting*, 17 N. H. 451.

(z) *Welsh v. Welsh*, 5 Ohio, 427.

Where the parties disagree and no contract is concluded, a vendee of land can recover the value of his improvements through a bill in equity, and is not confined to his right to use them as a defence or as a set-off.(a) In a number of cases the relief in equity has been expressly rested on the absence of a legal remedy.(b) A vendee who has improved the land under an oral contract of sale repudiated afterwards by the vendor, cannot recover at law for his work and labor, but may in equity for the improved value of the land.(c) And the value of such improvements, it has been held, cannot be recovered at law.(d) In another New Jersey case it was held that, under the prayer for general relief in a bill for specific performance, consideration-money paid cannot be recovered, but the remedy is at law.(e)

On the other hand, the remedy at law is not only not denied, but the jurisdiction of equity is allowed only after a discussion of the point.(f) And where a bill for specific performance brought by the vendee was refused, it was held in a North Carolina case that compensation for part performance could be recovered only at law.(g) But in another case it was held that, where a remainderman went into possession at the request of the tenant for life, the latter would be enjoined from resuming possession till he had paid for the betterments.(h) And this is a distinction that may well be taken, the former case requiring the machinery of equity and the latter not. In a New Hampshire decision it has been suggested that the remedy at law is for money paid and labor done.(i)

Where, as in Tennessee, there is in equity a lien upon the land for the consideration-money in whole or in part paid, there is, by means of this equitable jurisdiction to enforce the lien, a way of recovering such purchase-money paid.(j) And where, from special cir-

(a) *Herring v. Pollard*, 4 Humphr. 363; see *Gupton v. Gupton*, 47 Mo. 46.

(b) *Lee v. Howe*, 27 Mo. 523; *Gupton v. Gupton*, 47 Mo. 46; see *Sims v. McEwen*, 27 Ala. 192.

(c) *Mathews v. Davis*, 6 Humphr. 327.

(d) *Smith v. Smith*, 4 Dutch. 217.

(e) *Welsh v. Bayaud*, 21 N. J. 186.

(f) *Herring v. Pollard*, 4 Humphr. 363.

(g) *Murdock v. Anderson*, 4 Jones, Eq. 78, citing cases.

(h) *Baker v. Carson*, 1 Dev. & Bat. Eq. 381 (see dissenting opinion of Judge Daniel, who thought that the remedy was at law).

(i) *Lane v. Shackford*, 5 N. H. 132; but see, as to recovery for labor, *Mathews v. Davis*, *supra*.

(j) *Rhea v. Allison*, 3 Head, 178, where the court said: "It is settled in

cumstances, the money paid cannot be recovered at law, equity will relieve.(k) A bill for specific performance will sometimes be held in order to give relief in damages.(l) especially where compensation for improvements is sought.(m) An issue on a *quantum meruit* will be sometimes awarded;(n) or an account may be decreed(o) even under the prayer for general relief.(p) On the other hand, where a bill is brought for the specific performance of a sale of land evidenced by a memorandum, and the latter is not sufficient, compensation cannot be obtained, it has been held, under the prayer for general relief.(g) The propriety of ordering an account has been questioned.(r)

§ 610. The question as to who rescinds is an important one in determining the right to recover compensation. Where both mutually dissolve the contract, the right to recover is clear.(s) There may be modifications expressed or implied as to the extent of rescission; thus, where a vendee of land submitted (though it seems under protest) to the rescission of the contract, it was held that he could recover his payment but not his improvements.(t) In one sense

The question as to who rescinds; mutual rescission.

this State, that where a man is put in possession of land by the owner, upon an invalid or verbal sale, which the owner fails or refuses to complete, and in the expectation of the performance of the contract makes improvements, a court of equity will directly and actively, upon a bill filed by him against the owner for an account, make him compensation to the full value of all his improvements, to the extent they have enhanced the value of the land, deducting rents and profits, and will treat the land as subject to a lien therefor, *Herring & Bird v. Pollard's Executors*, 4 Hum. 362; *Humphreys v. Holtsinger*, 3 Sneed, 228, 230. The same rule must apply to purchase-money paid upon the faith of the contract. These decisions go beyond the doctrine of the English courts, which only allowed the value of the improvements, upon the ground, either that there was some fraud, or where the aid of a court of equity was actively sought by the owner to get pos-

session of the estate. See § 611 on the subject of the lien given in equity.

(k) *Ellis v. Ellis*, 1 Dev. Eq. 341.

(l) *Phillips v. Thompson*, 1 Johns. Ch. 145; *Aday v. Echols*, 18 Ala. 357.

(m) *Phillips v. Thompson*, *supra*; *Parkhurst v. Van Cortlandt*, Id. 273.

(n) *Phillips v. Thompson*, *supra*.

(o) *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Dunn v. Moore*, 3 Ired. Eq. 364; *Payne v. Graves*, 5 Leigh, 579.

(p) *Love v. Neilson*, 1 Jones, Eq. 339; see *Sain v. Dulin*, 6 Jones, Eq. 197, distinguishing and limiting *Love v. Neilson*.

(q) *Smith v. Smith*, 1 Ired. Eq. 83.

(r) *Black v. Black*, 15 Ga. 446.

(s) *Battle v. Rochester City Bank*, 5 Barb. 414; *Herring v. Pollard*, 4 Humph. 363; *Orand v. Mason*, 1 Swan, 196; *Sennett v. Johnson*, 9 Pa. St. 337.

(t) *Gillet v. Maynard*, 5 Johns. 85. See *infra*.

there must be always mutual rescission, for, as we shall see, if the vendor is willing to complete the contract, the vendee cannot rescind and recover compensation for his part performance, nor can a vendee do so unless he gives up all claim under the express contract; he must give up possession.(u)

In a Tennessee case it was said that "it would be unreasonable and unjust to permit a purchaser to retain the possession and use of the thing purchased, and yet to recover back the consideration as for a defect of title. The action for money had and received is in its nature equitable, and it cannot be maintained upon a principle so unequal and unjust. When a contract is properly rescinded, the parties are placed *in statu quo*."(v) A vendee who has taken possession and paid the price must restore possession and demand repayment before he can sue for the price.(w) Where the defendant had an interest in land which he could sell, but the title to which his father held, and the latter was to make the deed and receive the price, and the defendant orally warranted the acreage; it was held that under the Statute of Frauds the defendant was not liable on the special contract nor for compensation, inasmuch as he did not receive the money; the plaintiff did not offer to rescind.(x)

A complete rescission by the vendee was held in a Connecticut case to entitle the equitable vendor to a decree of title, but the latter was ordered to repay part of the price received, though the vendee had been clearly in default; the legal title in this instance had been conveyed directly from the vendor of the equitable vendor to the latter's vendee, who conveyed to the defendant with notice;(y) see, however, *infra*, for the authorities declaring that the vendee, to recover compensation, must have been ready to fulfill the oral contract.(z) Though perhaps a tender of possession will be sufficient.(a)

§ 611. Compensation can be had as well from a vendor who will not as from one who cannot perform the oral contract.(b) Money paid

(u) *Gale v. Nixon*, 6 Cow. 448.

(v) *Hurst v. Meana*, 2 Swan, 598.

(w) *Abbott v. Draper*, 4 Denio, 52.

(x) *Dyer v. Graves*, 37 Vt. 369.

(y) *Fox v. Kimberly*, 27 Conn. 316.

(z) *Long v. Saunders*, 88 Ill. 149.

(a) *Biggs v. Johnson*, 2 L. & Eq. Rep.

587; and see *Jellison v. Jordan*, 68 Me. 374.

(b) *Pengall (Lord) v. Ross*, 2 Eq. Cas. Abr. 46; *Maddera v. Smith*, 3 Stew. 122; *Hunt v. Sanders*, 1 Marsh. 553; *Reed v. Lander*, 5 Bush, 22; *Basford v. Pearson*, 9 Allen, 390; *Riley v. Wil-*

Compensation from a vendor who will not or cannot convey.

under a contract rescinded by the vendor may be recovered by the vendee, though it was a term of the contract that unless all the consideration was paid, part payments were to be forfeited.(c) Where, under an exchange of land, one tract has been conveyed and the other party rescinds, the price or value of the tract conveyed may be recovered.(d)

That a vendor who cannot carry out his contract is bound to compensate the vendee who has partly performed is well settled.(e) Where the vendor is insolvent, the vendee is entitled to a dividend out of his assets.(f) A conveyance of the land to a third person without notice, is a common instance of such inability of performance on the vendor's part as will entitle the vendee to compensation for expenditure, &c.(g) A vendee who spends money upon the land after he knows of the vendor's unwillingness to convey, cannot have compensation.(h)

Under the law of Louisiana, in a suit to annul the sale of land the plaintiff can prove by oral evidence that the defendant has

Hams, 123 Mass. 509; Taylor v. Read, 19 Minn. 375; Battle v. Rochester City Bank, 5 Barb. 414; Hamilton v. Gridley, cited in Cagger v. Lansing, 43 N. Y. 552; Galvin v. Prentice, 45 N. Y. 162; Thomas v. Kyles, 1 Jones, Eq. 305-6; Newkumet v. Kraft, 31 L. Int. 109 (C. P. No. 1); Taylor v. Rowland, 26 Tex. 294; Thouvenin v. Lea, 26 Tex. 612; Thomas v. Sowards, 25 Wis. 635.

(c) Mialhi v. Lassabe, 4 Ala. 712; and see Scott v. Bush, 26 Mich. 421, where the forfeiture stipulations fell with the rest of the invalid oral contract.

(d) Basford v. Pearson, 9 Allen, 390; Smith v. Hatch, 46 N. H. 146.

(e) Rhodes' Admr. v. Storr, 7 Ala. 347; Donaldson v. Waters, 30 Ala. 175; Crabtree v. Wales, 19 Ill. 55; Duncan v. Baird, 8 Dana, 101; Rowland v. Garman, 1 J. J. Marsh. 76; Dougherty v. Goggen, 1 J. J. Marsh. 373; Bedinger v. Whittamore, 2 J. J. Marsh. 552; Lewis v. Whitewell, 5 T. B. Mon. 191; Richards v. Allen, 17 Me. 296; Patterson v. Yeaton, 47 Me. 311; Kneeland

v. Fuller, 51 Me. 518; Jellison v. Jordan, 68 Me. 374; Segars v. Segars, 71 Me. 534; Seymour v. Bennet, 14 Mass. 286; Coughlin v. Knowles, 7 Metc. 57; Congdon v. Perry, 13 Gray, 3; Sims v. Hutchins, 8 Sm. & M. 328; Lane v. Shackford, 5 N. H. 132; Clements v. Marston, 52 N. H. 38; Dowdle v. Camp, 12 Johns. 451; Abbott v. Draper, 4 Denio, 52; Battle v. Rochester City Bank, 5 Barb. 414; Collier v. Coates, 17 Barb. 471; Galvin v. Prentice, 45 N. Y. 162; Winton v. Fort, 5 Jones, Eq. 252; Clancy v. Craine, 2 Dev. Eq. 363; Sneed v. Bradley, 4 Sneed, 303; Hilton v. Duncan, 1 Cold. 318; Shaw v. Shaw, 6 Vt. 69; Cobb v. Hall, 29 Vt. 510; Stone v. Stone, 43 Vt. 182.

(f) Sutton v. Sutton, 13 Vt. 71.

(g) Lee v. Howe, 27 Mo. 523; Greer v. Greer, 18 Me. 18; Wiley v. Bradley, 60 Ind. 63; Packer v. Steward, 34 Vt. 130; Trinkle v. Reeves, 25 Ill. 215; Bennett v. Phelps, 12 Minn. 332.

(h) Caine v. Kelly, 57 Miss. 831.

parted with the title to the land, as showing that he cannot carry out the contract.(i) A promise to serve in consideration of a gift of land by will cannot be sued on during the promissor's lifetime, unless the latter has disqualified herself from performing by conveying away the land.(j)

To enable one holding under an oral lease to recover for his improvements, it is not enough that the landlord refuses to give a written lease; there must be something equivalent to an eviction.(k) Where the plaintiff fails to show that he is in danger, as he claims, of being evicted under a paramount title, and the oral contract is not rescinded, he cannot have compensation.(l) A suit by the vendor to recover the land orally sold is a sufficient rescission.(m) That the vendor's title fails or proves defective or incumbered, is another example of such impossibility of performance as will give the vendee his compensation for improvements.(n)

The following are examples of failure of title. Thus, a parol promise to subscribers to a fund raised for paying off a mortgage on a meeting-house that the latter shall be conveyed to the subscribers is invalid under the Statute of Frauds; but the promissor, who claimed the money as a church agent, if he does not fulfill the promise must repay the amount.(o) Where the defendant fraudulently pretended to own land, and agreed with the plaintiff that the latter should improve and then that the two should hold jointly, the plaintiff could rescind and recover for labor and materials, the defendant having no title, and the consideration therefore failing.(p)

Where the defendant, a vendor, was a mortgagee who bought in the land at a foreclosure sale, but who held subject to a right of redemption on the part of the mortgagor, who did in fact redeem, the vendee improving has his right of action, though evicted by

(i) *Burbank v. Pierce*, 26 La. Ann. 295. apart from any consideration of the Statute of Frauds; *Swihart v. Cline*, 19

(j) *Campbell v. Campbell*, 65 Barb. 642 (an application of the rule of *Hochster v. De la Tour*, 2 E. & B. 678); see also *Packer v. Button*, 35 Vt. 192. *Ind. 285*; *Barickman v. Kuykendall*, 6 Blackf. 22; *Winters v. Elliott*, 1 Lea, 676; *Rickard v. Stanton*, 16 Wend. 26; *Jones v. Hay*, 52 Barb. 501; *Reddington v. Henry*, 48 N. H. 279; *Perkins v. Dunlap*, 5 Me. 269; *McDonald v. Lynch*, 59 Mo. 351.

(k) *Yates v. Bachley*, 33 Wis. 187.

(l) *McDonald v. Beall*, 52 Ga. 576.

(m) *Hairston v. Jaudon*, 42 Miss. 386.

(n) *Findley v. Wilson*, 3 Litt. 391; *Ewing v. Handley*, 4 Litt. 371, laying down the rule as a general one
(o) *Brackett v. Brewer*, 71 Me. 484.
(p) *Rickard v. Stanton*, 16 Wend. 26; see *Renkin v. Hill*, 49 Ia. 271.

the mortgagor and not by the defendant.(q) Where the vendor's wife will not release her rights, the title fails so as to give the vendee his right to compensation.(r) So where the vendor's representations are not fulfilled, as to the nature of the land, &c.(s)

Where a house which had stood on the land while the negotiations were going on was burnt, the rule was applied.(t) Where a bill to declare a constructive trust failed because the trustee had not the legal estate, the *cestui que trust* could recover compensation from the trustee.(u) Where the title proves defective the implied right to recover purchase-money paid is not affected by an oral express promise by the vendor to refund if the title failed.(v)

§ 612. It has been seen that a vendee seeking compensation must disavow the oral contract entirely; and it is equally certain, as will be considered hereafter, that if the vendor does not rescind the vendee cannot have his compensation; yet, as the authorities just cited show, when a vendor willing to perform is unable to do so properly, the vendee may rescind, and is entitled to be reimbursed for his expenditures.(w) So where the vendor is guilty of fraud.(x)

When vendor does not perform, the vendee's rescission is not strictly such.

In a New York case relating to a contract as to chattels, oral evidence was admitted to show that the buyer took with the right of trial and under the stipulation that a certain sum paid by him for the refusal of the article was, as well as the price itself, to be refunded him if he were not satisfied with his bargain.(y) As has been seen, the rescission of the contract must be complete by both the parties, and, therefore, where the vendor rescinds, no offer of performance by the vendee is necessary; and he can therefore recover his

(q) Reynolds v. Harris, 9 Cal. 338; see, however, McDonald v. Beall, 52 Ga. 576.

(r) Huff v. Price, 50 Mo. 230; Lister v. Batson, 6 Kan. 425.

(s) Cooper v. Merritt, 30 Ark. 692; Hellman v. Strauss, 2 Hilt. 11; Thompson v. Mason, 4 Bibb, 196 (and this though the vendee knew of the outstanding claim which affected his title).

(t) Blew v. McClelland, 29 Mo. 306; Thompson v. Gould, 20 Pick. 134.

(u) Green v. Drummond, 31 Md. 81; or where the trustee conveyed away the land, Duncan v. Laurence, 24 Pa. St. 157; see Findley v. Wilson, 3 Litt. 391.

(v) Thayer v. Viles, 23 Vt. 497.

(w) Rickard v. Stanton, 16 Wend. 26; Renkin v. Hill, 49 Ia. 271.

(x) Hawley v. Moody, 24 Vt. 603; Battle v. Rochester City Bank, 5 Barb. 414. See the two cases last cited.

(y) White v. Knapp, 47 Barb. 557.

purchase-money paid, damages, or improvements made without tendering any unpaid part of the price, &c.,(z) or demanding title.(a)

§ 613. Where the vendor is willing to complete the invalid oral contract relating to the land, the vendee can recover no compensation for his payments or part performance.(b) When vendor will perform there is no compensation. This principle is not confined to cases arising under the Statute of Frauds.(c) Money paid under a contract under the Statute of Frauds cannot be recovered without some evidence that the other party is unwilling to go on with the contract.(d) A plaintiff suing for compensation must clearly show his own diligence, the defendant's default, &c.(e)

Where one buys from another unable to sell without leave of court, and such leave is afterwards obtained, the vendee must take the land, though fallen in value, or give up his improvements.(f)

(z) *Cook v. Doggett*, 2 Allen, 439; *Packer v. Steward*, 34 Vt. 130; *Bennett v. Phelps*, 12 Minn. 332; *Adams v. Fairbain*, 2 Stark. 247; *Collins v. Thayer*, 74 Ill. 140.

(a) *Bennett v. Phelps*, *supra*.

(b) *Pulbrook v. Lawes*, 1 Q. B. D. 288; 45 L. J. Q. B. 179; *Delong v. Oliver*, 26 U. C. Q. B. 613; *Campbell v. Grier*, 11 U. C. C. P. 236; 10 id. 298; *Cope v. Williams*, 4 Ala. 362; *Keath v. Patton*, 2 Stew. 40; *Venable v. Brown*, 31 Ark. 566; *Udike v. Armstrong*, 4 Ill. 565; see *contra*, however, *Collins v. Thayer*, 74 Ill. 140; *Lingle v. Clemens*, 17 Ind. 124; *Duncan v. Baird*, 8 Dana, 101; *Rowland v. Gorman*, 1 J. J. Marsh. 76; *Bedinger v. Whittamore*, 2 J. J. Marsh. 553; *Gray v. Gray*, Id. 23; *Young v. Pate*, 3 id. 101; *Shreve v. Grimes*, 4 Litt. 223; *Roach v. Wade*, 4 T. B. Mon. 523; *Richards v. Allen*, 17 Me. 298; *Plummer v. Buckman*, 55 Me. 106; *Jellison v. Jordan*, 68 Me. 374; *Owings v. Low*, 7 H. & J. 133; *Seymour v. Bennet*, 14 Mass. 286; *Coughlin v. Knowles*, 7 Metc. 57; *Sennett v. Shehan*, 27 Minn. 329; *Sims v. Hutchins*, 2 Sm. & M. 331; *McGowen v. West*, 7 Mo. 570; *Lockett v. Williamson*, 37 Mo. 395; *Parker v. Niggeman*, 6 Mo. App. 547, citing cases; *Lane v. Shackford*, 5 N. H. 132-3; *Ayer v. Hawks*, 11 N. H. 152; *Reddington v. Henry*, 48 N. H. 279; *Clements v. Marston*, 52 N. H. 38; *Long v. Hartwell*, 5 Vroom, 121; *Dowdle v. Camp*, 12 Johns. 451; *Battle v. Rochester City Bank*, 5 Barb. 414; *Collier v. Coates*, 17 Barb. 471; *Abbott v. Draper*, 4 Denio, 53; *Fuller v. Hubbard*, 6 Cow. 17; *Cagger v. Lansing*, 43 N. Y. 551; *Galvin v. Prentice*, 45 N. Y. 162; *Day v. N. Y. R. R.*, 51 N. Y. 590; *VanValkenburg v. Croffut*, 15 Hun, 148; *Clancy v. Craine*, 2 Dev. Eq. 363; *Foust v. Shaffner*, Phill. Eq. (N. Car.) 242; *Abbott v. Inskip*, 29 Ohio St. 59; *Pugh v. Good*, 3 W. & S. 58; *Reed v. Reed*, 12 Pa. St. 117; *Cline v. Simpson*, 4 Phila. 120; *Bloomstein v. Clees*, 3 Tenn. Ch. 439; *Reynolds v. Johnston*, 13 Tex. 215; *Sutton v. Sutton*, 13 Vt. 71; *Davis v. Farr*, 26 Vt. 592. And see the chapter on "Voluntary Performance."

(c) *Ketchum v. Everton*, 13 Johns. 359.

(d) *Barber v. Armstrong*, 6 U. C. Q. B. O. S. 544.

(e) *Naftzinger v. Roth*, 9 W. N. C. 495; 93 Pa. St. 448.

(f) (*In re*) *Yaggie*, 1 Ch. Cham. U. C. 52.

The vendor must so have conducted himself as to be estopped from setting up the Statute of Frauds,^(g) or, as it has been also said, the vendee has affirmed the contract by his part performance, and as it is not void *per se*, he cannot repudiate it.^(h) The law, it was observed in another case, will not allow the party who is solely in default for not having the full benefit of his contract, to abandon it and recover back what he has paid or done under it.⁽ⁱ⁾ The vendee can only recover when the vendor has refused to give a memorandum or to make title.^(j)

Where the defendant, the vendor, swears that he is ready to carry out a verbal contract relating to land, the plaintiff cannot recover a payment even though there be a defect in the title, if he have acquiesced in the latter.^(k) In absence of evidence either way, it will be presumed that the defendant is willing to carry out the contract.^(l) But where the vendee is sought to be held, and there is no other part performance than part payment, and nothing to indicate that he was not willing to lose the amount so paid, he will not be held for the balance.^(m) That the payment of the purchase-money has been complete makes no difference.⁽ⁿ⁾ Even if the money sued for was paid the plaintiff's husband without her knowledge, it cannot be recovered if the defendant is ready to complete the oral contract.^(o)

§ 614. The vendee must at least have offered to rescind because of the Statute of Frauds, and have before the suit requested repayment.^(p) The right of action must accrue before suit brought.^(q) The involved and obscure case of *Sweet v. Lee*^(r) supports this view also; there the plaintiff sued to recover money paid under an oral contract within the Statute of Frauds; the defendant denied that he had broken the contract, and set up the

Vendee must before suit have made his claim; the other cases where no compensation can be had.

(g) *Abbott v. Inskip*, 29 Ohio St. 59.

(h) *Mitchell v. McNab*, 1 Bradw. 299.

(i) *Packer v. Button*, 35 Vt. 192; see *Mialhi v. Lassabe*, 4 Ala. 712.

(j) *Barber v. Armstrong*, 6 U. C. Q. B. O. S. 545.

(k) *Patterson v. Irwin*, 21 U. C. C. P. 133.

(l) *Keath v. Patton*, 2 Stew. 40.

(m) *Capehart v. Hale*, 6 W. Va. 556.

(n) *Rogers v. Brightman*, 10 Wis. 65.

(o) *Gammon v. Butler*, 48 Me. 344, citing cases.

(p) *Marsh v. Wyckoff*, 10 Bosw. 207; but *query* whether to have done so would have affected the matter; *Abbott v. Draper*, 4 Denio, 52.

(q) *Naftzinger v. Roth*, 93 Pa. St. 448; 9 W. N. C. 495.

(r) 5 Jur. 1134; 4 Scott, N. R. 77 3 M. & G. 452.

statute; the defendant claimed as set-off, however, on another claim in the same suit the amount due under the oral contract, and to this the plaintiff replied the statute; the court held that the plaintiff's payments under the special oral contract were voluntary, and could not be recovered; the case plainly showed that at the time of suit there was no unwillingness on the defendant's part to fulfill it; his availing himself in the action itself of the defence of the Statute of Frauds was the first evidence of a disavowal of the oral contract.

A buyer of goods who signed the memorandum of sale and gave notes for the price cannot in a suit on the latter defend upon the ground that he had no right of action against the plaintiff, who had not signed the memorandum, the defendant never having demanded a written assignment of the goods.^(s) Where the vendee repudiating the contract has injured the land while in possession of it, his right to recover payments made is all the weaker.^(t) The vendee of an equity of redemption who undertakes to pay the mortgage and agrees that the mortgagor shall convey the land as security to mortgagee, and who pays part of the mortgage, can rescind though he has taken possession, if he relinquishes his right to recover what he has paid.^(u)

It is a good defence to a promissory note that it was to be paid by the conveyance of certain land, and that the defendant was ready to deliver the deeds.^(v) Under the civil law, to an action for money lent it is a good defence that the money was a part payment under an oral contract of sale of land.^(w) Where one has agreed to take pay in land for services he cannot, upon refusing a deed, recover compensation in money.^(x) A verbal agreement to pay for services by a share in land is a good defence to an action for value of the services, for *non constat* that the vendor will not carry out the verbal contract, and the only promise is to give land, not money.^(y) It is, however, a good defence to a note to say that it was given for the

(s) *Weightman v. Caldwell*, 4 Wheat. 87.

(t) *Cilley v. Burkholder*, 41 Mich. 751.

(u) *Davis v. Farr*, 26 Vt. 592.

(v) *Cassiday v. Askin*, 2 W. N. C. (Phila.) 82.

(w) *Bouche v. Michel*, 10 Robin. 96; but see *infra*.

(x) *Johnson v. Moore*, 1 Blackf. 253; *Van Valkenburg v. Croffut*, 15 Hun, 148; *Bailey v. Gardner*, 6 Abb. New Cas. 150; *Galway v. Shields*, 66 Mo. 313, reversing S. C. 1 Mo. App. 549; *Bechtel v. Cone*, 52 Md. 706.

(y) *M'Clarty v. M'Clarty*, 19 U. C. C. P. 313.

price of land, and under the agreement of sale the vendor was to have given the defendant a written contract, and had not done so.(z)

§ 615. The analogy of this rule applies in the case of chattels.(a)

The general rule applied to chattels; Sweet v. Lee.

The general rule of compensation applies as well to the sale of chattels as to that of lands, it being remembered that if the part performance is part payment, the statute is complied with.(b) Where goods were to be taken by the defendant in part payment of land sold by parol by him to the plaintiff, and the former is ready to carry out the contract, the plaintiff cannot recover the value of the goods.(c) The rule also applies to contracts not susceptible of performance within a year.(d)

In the interesting case of *Sweet v. Lee*, given above, the plaintiff, a publisher, had paid several installments of a life annuity which he promised the defendant for writing a law treatise for him, and the book not being written brought suit to recover these payments; to his declaration averring this contract and the defendant's negligence and failure to perform it, the latter, besides pleading *non assumpsit*, pleaded specially that he had not so failed, and the plaintiff replied *de sua injuriâ*. Under this replication the plaintiff showed that the contract was for more than a year, and therefore within the Statute of Frauds; but the court held that though the statute did apply, and the contract could not be enforced, yet that the payments were voluntary and could not be recovered, the contract not being void *per se*.(e) The opinion of the court is brief, and it does not appear whether, if the plaintiff had sued alone on the special contract, and had compelled the defendant either to deny it, or to acknowledge it by the assertion that he the latter was not in default, the plaintiff could then have compelled a waiver of the Statute of Frauds in the latter alternative, or in the former such a rescission of the contract as would have enabled him to recover his payments made. It might indeed be inferred from the language of the decision, that payments made under a contract within the Statute of Frauds are voluntary, and cannot be recovered at all.

(s) *Bronson v. Silverman*, 32 Leg. Int. 100 (S. C. Pa.)

(a) *Wheeler v. Spencer*, 24 Hun, 30.

(b) *Allis v. Read*, 45 N. Y. 147.

(c) *Hoskins v. Mitcheson*, 14 U. C. Q. B. 552.

(d) *Mack v. Bragg*, 30 Vt. 572; *Van Valkenburg v. Croffut*, 15 Hun, 148.

(e) 3 M. & G. 453; 4 Scott, N. R. 77; 5 Jur. 1134.

§ 616. A mere promise of the vendor to repay under certain conditions, is without consideration where the abandonment of the contract by the vendee was not made on account of the promise.^(f) In a Minnesota case, where it was stated in the pleading that the money, which is sought to be recovered, was paid by the plaintiff to the defendant "as and for part of the purchase price" of certain land which it is alleged the defendant agreed by parol to sell and convey to plaintiff whenever the latter should so request, the court said: "It is not stated what the consideration for the promise to convey was, nor when it was to be paid. Thus considered, the payment and the conveyance must be treated as concurrent and dependent acts, to be performed at the same time. The rule in respect to contracts of that character is, that neither party can compel performance by the other, or rescind for non-performance, without first offering and being ready to perform on his part. This rule applies to all contracts with mutual and dependent covenants or promises, including alike parol contracts, void as such by the Statute of Frauds, and those not affected by the statute;" and added that it would presume that the rest of the price was to be paid when the land was conveyed.^(g)

The claimant must not be in default.

Where the vendor has not refused to make title to land under a verbal contract, the vendee who has failed to complete payment of purchase-money cannot recover back a payment agreed to be forfeited, if he the vendee did not comply with his contract.^(h) It is the fact that the vendee is not in default, and is not the one asserting the invalidity of the contract, that gives him his right to compensation for part performance.⁽ⁱ⁾ Where the vendee has failed to perform or to tender performance of his part of the contract, he cannot, under the principle just laid down, recover compensation.^(j)

Where the answer admits a different contract from that alleged in the bill, no decree will be made ordering the purchase-money paid into court, where the plaintiffs do not offer to perform the contract as stated by the defendant; the defendant had partly per-

^(f) *Campbell v. Grier*, 11 U. C. C. P. 236; 10 id. 298.

^(g) *Sennet v. Shehan*, 27 Minn. 329.

^(h) *Hanschid v. Stafford*, 25 Iowa, 428.

⁽ⁱ⁾ *Harris v. Frink*, 49 N. Y. 27, re-

versing S. C. below, 2 Lans. 35, and citing cases; see *Kneeland v. Fuller*, 51 Me. 518, citing cases; *Goodwin v. Lyon*, 4 Porter (Ala.), 305.

^(j) *Roach v. Wade*, 4 T. B. Mon. 523; *Segars v. Segars*, 71 Me. 534.

formed by possession and improvements.^(k) So where the plaintiff who, relying on an oral contract of letting made by a life tenant with power to lease, has failed to get a written lease, he cannot have compensation from him in remainder;^(l) but this ruling rather rests on the consideration that the part performance was not with the remainder-man's assent, and therefore he is not bound even to give compensation.

In another case, the parties having submitted to it, compensation was given for part performance made by a lessee under a parol contract of lease entered into by a life tenant with power to let, and this both against the life tenant and the remainder-man.^(m) And where one H. W. sold land to Crocker, the defendant, who leased it back to H. W. and gave a bond to the latter, allowing him to buy back the land on certain terms; H. W. sold part of the land to the plaintiff, who made a part payment and entered and improved the land; the part payment was made to H. W. (who by defendant's consent kept it); it was held that the defendant was not liable to repay this money, as he had not received it; nor for the improvements, as the land was out of his possession under the lease to H. W., and *non constat* that H. W. might not redeem the land and convey to the plaintiff.⁽ⁿ⁾

Where, however, it is the remainder-man himself who at the request of the life tenant enters and improves, the latter cannot resume possession without giving compensation.^(o) Where the vendee, who improved the land he had bought, had accepted a deed from the owner in submission to a decree of a lower court that under a certain oral contract he was bound to do so, and the decree in question was afterwards reversed, he is entitled to compensation.^(p)

§ 617. In Illinois the rule that where the vendor is ready to go on with the contract the vendee cannot rescind so as to recover payment made, does not prevail, and either party may rescind without making any offer of performance, and the vendor can recover the land or the vendee his money.^(q) A

General rule
denied (see
§ 620).

(k) *Benson v. Glastonbury Nav. Co.*,
1 Coop. C. C. (Eng.) 42.

(l) *Blore v. Sutton*, 3 Mer. 248.

(m) *Trotman v. Fleisher*, 3 Giff. 9.

(n) *Stone v. Crocker*, 19 Pick. 291.

(o) *Baker v. Carson*, 1 Dev. & Bat.
Eq. 381.

(p) *Thompson v. Mason*, 4 Bibb, 196.

(q) *Collins v. Thayer*, 74 Ill. 140. See
also *Wood, Mast. & Serv.*, § 189, p. 364.

sale of land by parol is void in Michigan, and a purchaser can refuse to complete and can recover what he has paid.^(r) In a Tennessee case it was said that "no right or duty can be predicated upon a void contract; it is the same as if it had not been made. Therefore, if a party enter upon land and pay money under a parol contract for its purchase, he may recover it back by action for money had and received for his use, without restoring the possession or doing other acts to rescind the contract; for the contract never had a legal existence, and, of course, no action could be maintained upon it."^(s)

§ 618. A similar doctrine was suggested in a Connecticut case in which it was held that where one K., entitled by a contract to a conveyance of land, sold her right, and her vendee, to whom she procured a deed of the land to be made, partly paid her and then refused to complete his payments, and conveyed away the land with notice, she must, upon obtaining a decree establishing her title, repay her vendee what she had received.^(t) it might be said here, however, that K., having the choice to affirm the contract and sue for the balance of the price, or to accept her vendee's rescission of it and claim the land, and having taken the latter alternative, might be said to have rescinded the contract, and was therefore bound to give compensation. If this is law, we must modify the general rule that a vendee, to recover compensation, should be in no default, but should be ready to perform, by adding that the vendor, by accepting such rescission and reclaiming his land, has so far confirmed the vendee's act as to make the rescission mutual; which, as we have seen, is a case where the right of compensation is undoubted. In *Fox v. Kimberly*, while it is true that K., the vendor, got back her land, she owed no thanks to the vendee, who, after refusing to complete his payments, conveyed away the land, though to one who had notice of K.'s claim.

How far the vendor, by accepting the vendee's rescission, may waive the latter's default and lay ground for recovery of compensation.

This question has arisen in New York also, and a less extreme position has been taken; it was held that a plaintiff who had delivered goods in part performance of a parol contract for the

(r) *Nims v. Sherman*, 43 Mich. 50, citing *Scott v. Bush*, 28 id. 420. *Barickman v. Kuykendall*, 6 Blackf. 22; *Pipkin v. James*, 1 Humphr. 325.

(s) *Hurst v. Means*, 2 Swan, 598, citing *Walker v. Constable*, 1 B. & P. 306; (t) *Fox v. Kimberly*, 27 Conn. 316.

purchase of land, and who had entered upon the possession of the latter, could not recover for the goods until he had restored the possession of the land to the defendant and demanded back what had been advanced upon the contract. Bronson, Ch. J., went further, and declared that, as long as the vendor is not in default, but is ready to perform the contract on his part, the vendee could not recall a payment made upon the parol agreement. The reasoning of the learned Chief Justice is that, as the vendor is not in the wrong but is able and willing to perform, he cannot be regarded as holding the money as debtor, but as owner; that the consideration upon which it was paid has not failed, and a promise to repay it cannot therefore be implied.(u)

And Bronson's view is supported by a recent Georgia case, in which, where the defendant, a vendee by parol, took possession of land and made improvements, and the vendor offered a deed with a good warranty of title, which the vendee refused because the vendor's title was prescriptive, it was held that he must either take the deed and pay the price or give up the land, and that his excuse for not surrendering the land that he had his improvements at stake, and that the land was threatened by judgments, &c., was not sufficient, as the land might never be seized, and that instead of making expensive improvements he should have taken his money to pay for the land; and the verdict of the jury that the vendor make deed and the vendee pay; if not, the land to revert to the vendor, was sustained.(v) So in a late decision in North Carolina, it was held that a vendor suing for the possession of his land which the vendee had taken possession of and had improved, but which he would not pay for nor give possession of till compensated for his improvements, can, upon admitting the oral contract of sale and offering to perform, recover possession without being liable to repay the vendee his expenditure.(w)

So a vendee, it has been held, who rescinds cannot even set off the value of his improvements in an action brought against him by the vendor for use and occupation.(x) It is entirely consistent with

(u) *Hellman v. Strauss*, 2 Hilton, 10, & Bat. Eq. 9, as a case where the vendor quoting *Abbott v. Draper*, 4 Den. 51. did not waive the Statute of Frauds.

(v) *Cherry v. Davis*, 59 Ga. 454.

(x) *Guthrie v. Holt*, 9 Chic. Leg.

(w) *Long v. Finger*, 74 N. Car. 504, News, 216 (S. C. Tenn.) distinguishing *Albee v. Griffin*, 2 Dev.

the views just given, that a vendee who having sought to enforce the contract is defeated by the Statute of Frauds should be entitled to protection against liability on notes given as the consideration for the land.(y)

§ 619. While the circumstance of the vendor being the one to profit by the part performance of the oral contract is the ordinary one, it sometimes happens that he may have received no benefit at all, while the vendee has enjoyed the use of the land. The rule which prevents a vendee rescinding from recovering compensation from a complying vendor holds in the converse case, and a vendor cannot recover for use and occupation from a vendee willing to carry out the contract, especially if the rescission has been in bad faith.(z) And where a vendee who has had possession makes no payment and abandons the land, he is liable for use and occupation;(a) and cannot deny the vendor's title, the latter being his landlord under, it seems, a tenancy at will.(b) So where the defendant holds the land under an oral contract of lease, and refuses to take a demise.(c)

Whether vendor can recover for use, &c., against a vendee willing to go on.

What is sued for is the benefit received by the lessee, viz., the profits of the land.(d) A vendee under an oral sale who refuses a deed is liable in trespass or for use and occupation.(e) And a rescinding vendee, as we have seen, cannot, when sued for use and occupation, set off the value of his improvements, the vendor being in no default.(f) The distinction is between law and equity; and a vendee can bring a bill for the value of improvements, &c., if he is in no default and the vendor is.(g) A general principle laid down by Judge Story was in Tennessee applied in this way, and, as will be seen (§ 620, n. (l)), was carried even further and the same right given to a rescinding vendee. The following is a good example of the extent of a vendor's right of compensation: A complainant in equity had bought stoves of the respondent under a written con-

(y) *Gottschalk v. Witter*, 25 Ohio St. 80.

(z) *Gretton v. Smith*, 33 N. Y. 249; see the observation of the court in *Bloomstein v. Cleas*, 3 Tenn. Ch. 439.

(a) *Smith v. Wooding*, 20 Ala. 329, relying on *Hull v. Vaughan*, 6 Price, 157, and denying *Kirtland v. Pounsett*, 2 Taunt. 145.

(b) *Whitney v. Cochran*, 1 Scam. 210.

(c) *Little v. Martin*, 3 Wend. 219;

see *Peabody v. Rice*, 113 Mass. 33.

(d) *Wells v. Deming*, 2 Root, 149.

(e) *Clough v. Hosford*, 6 N. H. 233.

(f) *Guthrie v. Holt*, 9 Chic. Leg. News, 216 (S. C. Tenn.)

(g) *Rainer v. Huddleston*, 4 Heisk. 226, citing *Rhea v. Allison*, 3 Head, 178, and other cases.

tract to pay for the same when delivered, and under this contract the respondent had sued the complainant at law for the unpaid portion of the price. The proceeding sought an injunction of the suit at law, &c., upon parol proof that the complainant was to pay part in cash and part in land; that he had paid the cash, and that his agent had tendered the deed which the respondent took but afterward rejected; that under the contract the complainant had cleared the land of certain incumbrances and had procured the land to be bought in under a foreclosure of a mortgage which the respondent had agreed to assume, but which he did not assume; the complainant was allowed to recover and the respondent compelled to pay compensation in the matter of the mortgage.(h)

Under the Illinois rule already stated, by which either party can recover what he has lost by the contract irrespective of the desire of the other to complete the contract, the vendor may recover the land or compensation for its use, and the latter either in a suit therefor or as set-off to a suit by the vendee for his expenditures.(i) It may be well to note here the great difference there is between a rescinding vendor who seeks to recover his land and one who sues for use and occupation; the latter, even where the acts done by the vendee are not sufficient part performance to create an equitable title in the land, cannot recover in a suit for use and occupation if the vendee is willing to perform, whereas in such a case the vendor can always recover the land itself. This point, obvious as it is, seems to have been overruled in a recent Tennessee case, where it was said that not only could a vendee not recover compensation from a vendor willing to convey, but that in the converse case a vendor could not recover the land from a vendee willing to take title.(j) A recovery of compensation by either party whether for expenditures upon the land or for profits taken from it does not affect the land itself or pass title by parol; nothing under the Statute of Frauds can do so except such acts as amount to equitable part performance, or to an estoppel or a dedication, &c.

§ 620. There are a number of decisions in which the strict rule

(h) *Adams v. Smilie*, 50 Vt. 7.

(i) *Collins v. Thayer*, 74 Ill. 140. See *infra*.

(j) *Bloomstein v. Cleas*, 3 Tenn. Ch. 439, citing *Hilton v. Duncan*, 1 Cold. 318,

Roberts v. Francis, 2 Heisk. 133, *Hamilton v. Gilbert*, *Masson v. Swan*, 6 id. 455, *McClure v. Harris*, 7 id. 379, but admitting that these cases were all overruled in *Biggs v. Johnson*, 2 L. & Eq. Rep. 587.

of requiring the vendee seeking compensation to have been in no default under the oral contract has been greatly relaxed if not quite abrogated. Thus, a vendee by parol who had refused to take land though the vendor was willing to convey, was allowed by the Master of the Rolls to recover a part payment made; his Honor saying that it would be very inconsistent for the court to investigate by whose fault a sale went off, and that it would only do so when there was a *valid* contract.^(k) So in Tennessee, a vendee who elected to rescind though the vendor did not refuse to convey, was allowed to recover compensation.^(l) So where a chattel was to be paid for by the conveyance of land and the plaintiff, the seller, had delivered the chattel but refused the deed tendered, he might recover the chattel after a demand for it and a refusal.^(m)

The general rule denying compensation to a vendee in default, relaxed or denied (see § 617).

And in another case, it being held that part performance by the vendee does not prevent the vendor's rescinding if the former refuses to perform an essential term of the contract, yet it was implied that he, the former, should be put *in statu quo*.⁽ⁿ⁾ So the plaintiff's services were to be paid for by the conveyance to him of land, it was held that neither party being bound, there was no sufficient consideration for the plaintiff's promise, and that he might stop at his pleasure and recover for services actually rendered.^(o)

Where the court felt a doubt as to the extent of the plaintiff's default, they allowed him to recover compensation; had the point been clear the decision, it was said, would have been otherwise.^(p) Money deposited with a third party until a good deed is made is not considered as actually paid, and the vendee can rescind and direct the money not to be paid to the vendor.^(q)

§ 621. Besides the exception which forbids recovery by a vendee in default, there are instances in which, for other reasons, such recovery is disallowed, some of the decisions, indeed, going the length of denying altogether the right of compensation. Thus, where the defendant orally

Other cases in which no compensation can be recovered.

(k) *Casson v. Roberts*, 31 Beav. 616, citing *Gosbell v. Archer*, 2 Ad. & Ell. 500.

(l) *Masson v. Swan*, 6 Heisk. 455.

(m) *Spoor v. Newell*, 3 Hill, 307.

(n) *Abbott v. Draper*, 4 Denio, 52; *Shepherd v. Fish*, 17 Ind. 230.

(o) *Crawford v. Parsons*, 18 N. H. 295 (it being said that the plaintiff was not obliged to invoke the aid of *Britton v. Turner*, 6 N. H. 481).

(p) *Hawkins v. Beal*, 4 Dana, 6; see also *Hemphill v. Miller*, 16 Ark. 287.

(q) *Murray v. Pate*, 6 Dana, 336.

agreed to buy a chattel, and to pay for it in land, and he afterwards refuses to take the chattel or convey the land, he is not liable to pay for the labor bestowed by the plaintiff in preparing the chattel; for not only must the plaintiff have parted with a benefit, but the defendant must have received it.(r)

Money forfeited if the oral contract is not performed cannot be recovered.(s) So improvements not done at the vendor's instance, nor as part of the consideration, cannot be recovered at law at least.(t) So where to a bill for specific performance, and for compensation, the defendant denied the contract alleged in the bill, and set forth a different one, no compensation will be decreed, because the part performance could not have been under the contract admitted in the answer, if the plaintiff's own showing is to be taken.(u)

Where the improvements have not benefited the estate, and a lessee, the plaintiff, has wasted, no compensation will be decreed.(v) The improvements must be valuable and lasting, and have enhanced the value of the land.(w) Money paid by A. to B. for land to be conveyed to C. can only be recovered by A.(x)

Where there was part performance on both sides the right of compensation has been denied; and goods delivered in payment of a sum due on an oral contract within the Statute of Frauds cannot be recovered; the express contract negatives the idea of an implied contract to pay for them.(y) Thus, where the defendant took the land in suit under an exchange, but conveyed away the corresponding tract to a third person, and endeavored unsuccessfully to deny the plaintiff's title and to claim one for himself in the land in dispute, it was held that the plaintiff should recover notwithstanding that the defendant had improved the land, and he the defendant could not have a verdict upon paying the value of the other less the value of the improvements put by him upon

(r) *Dowling v. McKenney*, 124 Mass. 480; see also *Dyer v. Graves*, 37 Vt. 369.

(s) *Goodrich v. Nichols*, 2 Root, 498.

(t) *Shreve v. Grimes*, 4 Litt. 223.

(u) *Sain v. Dulin*, 6 Jones, Eq. 197; criticizing and distinguishing *Thomas*

v. Kyler, 1 Jones, Eq. 312, and distinguishing *Love v. Neilson*, Id. 339.

(v) *Vaughan v. Cravens*, 1 Head, 108.

(w) *Stark v. Cannady*, 3 Litt. 403;

McCampbell v. McCampbell, 5 Litt. 92;

Parkhurst v. Van Cortlandt, 1 Johns.

Ch. 280; *Herring v. Pollard*, 4 Humphr.

363; *Humphreys v. Holsinger*, 3 Sneed, 229.

(x) *Beaman v. Buck*, 9 Sm. & M. 210.

(y) *Foote v. Emerson*, 10 Vt. 342.

the tract in dispute.(z) Where a vendor refusing to convey allowed the vendees to have enjoyment of all their improvements, compensation was not decreed.(a)

The right to compensation has been denied altogether in one or two instances;(b) and it has been suggested, as we have seen, that payments under an oral contract within the Statute of Frauds are voluntary and cannot be recovered.(c) A voluntary payment made under an oral contract cannot be recovered by one who rescinds and sets up the Statute of Frauds.(d)

In the civil law in Louisiana the right to compensation has been denied; and in one case the court said: "The plaintiff alleged that he is a possessor in good faith, not liable to pay rent, and entitled to recover the value of his improvements, and that the evidence offered by him, if not legal to establish his title, should have been received to prove the nature of his possession. This is only alleging in another form, that it should have been admitted to prove his title, because, unless there was a title, he could not prove his possession under it. It is well settled that when questions of title arise in an action of damages, the proof required is the same as in petitory actions."(e)

§ 622. Not only are part payments and improvements, as we have seen, subjects of compensation, but services also rendered under an oral contract invalid because the conveyance of land was the consideration thereof, or because it was not to be performed within a year.(f) While the question as to how services shall be recompensed comes up most frequently in the case of contracts relating to land and those not capable of performance within the year, and is considered in the chapters relating to those subjects, a few points on the general subject may here be taken up. In an early Massachusetts case, while it was admitted that payments were a subject of recovery, the court would

Compensation for services.

(z) *French v. Seely*, 7 Watts, 231.

(a) *Miller v. Tolia*, 41 N. H. 84.

(b) *Craig v. Van Pelt*, 3 J. J. Marsh. 491, but see contra, *supra*.

(c) *Sweet v. Lee*, 3 M. & G. 453; 4 Scott, N. R. 77; 5 Jur. 1134.

(d) *Craig v. Van Pelt*, *supra*.

(e) *Bradford v. Cook*, 4 La. Ann. 232, citing *Patterson v. Bloss*, 4 La. 374; but

see *supra*, *Bouche v. Michel*, 10 Robin. 96.

(f) *Rosepaugh v. Vredenburg*, 23 N. Y. Supreme Ct. 63; *Hambell v. Hamilton*, 3 Dana, 501; *Dix v. Marcy*, 116 Mass. 417; see *Baxter v. Kitch*, 37 Ind. 554; *Updike v. Ten Broeck*, 3 Vroom, 116; *Turnour v. Hochstadter*, 7 Hun, 80.

say no more than that perhaps the value of labor and services was also.(g)

At a later time it was not only acknowledged that there was no doubt as to this right, but a disposition was shown in more than one of the United States to do away with the Statute of Frauds when the claim for land was based upon services rendered. Where the services are of such a peculiar character that their value cannot be estimated except by the standard adopted by the parties themselves in the oral contract, the simpler rule would seem to be to adopt the services as sufficient part performance, and to decree specific performance.(h) But before going on with this question, it may be well to note that to the right of compensation for services the same qualifications apply as in the case of compensation for any other part performance. There can, for example, be no recovery if the defendant is willing to perform.(i)

§ 623. To return to the question of the extent of compensation to which one serving in consideration of receiving a conveyance of land is entitled, there is a plain preponderance of authority in favor of the rule that the person seeking compensation should declare on a *quantum meruit*, and not on the special contract.(j) And that the measure of damages is the actual value of the services and not of the land.(k)

Following the present rule, which gives only the actual value of the services under a contract by which the services were to be rewarded by land, a Pennsylvania case in which a gift in consideration of services was sought to be made out on parol evidence after the donor's death, and the alleged gift was the share of a relation,

(g) *Seymour v. Bennett*, 14 Mass. 268.

(h) *Rhodes v. Rhodes*, 3 Sandf. Ch. 281.

(i) *Galvin v. Prentice*, 45 N. Y. 162; *Bailey v. Gardner*, 6 Abb. N. C. 150; *Johnson v. Moore*, 1 Blackf. 253; *Abbott v. Inskip*, 29 Ohio St. 59; though *semble* contra, *Crawford v. Parsons*, 18 N. H. 294.

(j) *Pulbrook v. Lawes*, 1 Q. B. D. 288; 45 L. J. Q. B. 179, overruling *Hodgson v. Johnson*, E. B. & E. 685;

see *Cocking v. Ward*, 1 C. B. 867; *Rosepaugh v. Vredenburg*, 23 N. Y. Sup. Ct. 63; *Shute v. Dorr*, 5 Wend. 202; *King v. Brown*, 2 Hill, 485; *Lockwood v. Barnes*, 3 Hill, 136; *Ham v. Goodrich*, 37 N. H. 196; *Emery v. Smith*, 46 N. H. 151; *Watson v. Watson*, 1 Houst. 211.

(k) *Rosepaugh v. Vredenburg*, 23 Sup. Ct. 63; *Fuller v. Reed*, 38 Cal. 99; *Quackenbush v. Ehle*, 5 Barb. 469; *Watson v. Watson*, 1 Houst. 211 (*semble*); *Erben v. Lorillard*, 19 N. Y. 301.

i. e., "as much as to any relation on earth," held that this was too indefinite. The suit was, it seems, for money, and the Statute of Frauds did not strictly apply, but on analogy the actual value only of the services was given.(l)

An oral rescinded contract for the sale of land cannot be proved even to enable the plaintiff by its terms to recover interest on his purchase-money, or for expenses incurred in ascertaining the title.(m) The law as above given, though now well settled in New York and Pennsylvania, was at one time the other way.(n) And in a comparatively modern New York decision the rule had not attained its present distinct character; and it was said that the value of the land is only the measure when fixed in its nature with a determinate value, and referred to by the parties, and for this reason only it was held that the special contract could not be looked to where it had been agreed that the reward of the service should be the property which the person served might leave at death.(o)

And there is one English authority authorizing the admission of the evidence of the oral contract; and where the plaintiff sued on the common counts in *assumpsit* for the value of services rendered the defendant, and on a count for work and labor as a clerk, it was held to be no error to have allowed him to prove, in showing damages, the performance by him of the terms of a certain parol contract, invalid under the Statute of Frauds, by which he was to serve the defendant for three years in consideration of £60; Kelly, C. B., saying that the plaintiff might have shown that the defendant had made a contract of like terms with another in his

(l) *Graham v. Graham*, 34 Pa. St. 482; see *Leslie v. Smith*, 32 Mich. 67. Nor can he even use it as persuasive evidence of the value of the services; *Erben v. Lorillard*, *supra*; *Galvin v. Prentice*, 45 N. Y. 152; denying *King v. Brown*, 2 Hill, 485. And see *Emery v. Smith*, 46 N. H. 151, where the only evidence offered was that of the consideration reserved in the oral contract; but see *Ham v. Goodrich*, which is approved of in *Emery v. Smith*, and which holds that the contract is admissible as one of the facts of the case; the conclusion would seem to follow that in New

Hampshire the consideration, as stipulated for in the oral contract, might be admissible with other evidence of the actual damages, but cannot be received alone; see also *contra*, *Clark v. Terry*, 25 Conn. 395; *Reynolds v. Jordan*, 6 Cal. 111 (a case not arising under the Statute of Frauds).

(m) *Walker v. Constable*, 2 Esp. 661; 1 B. & P. 305.

(n) *Burlingame v. Burlingame*, 7 Cow. 92; *McDowell v. Oyer*, 21 Pa. St. 421. See "Land;" "Year."

(o) *Lisk v. Sherman*, 25 Barb. 433.

the plaintiff's position, and therefore argued why should not the plaintiff show the invalid contract between the parties themselves.(p)

§ 624. The cases which relate to contracts not to be performed within a year, while governed as to the point of compensation by the same principles as other cases of part performance, exhibit a great divergency of decision; and may therefore be given a place of their own. When there has been part performance, the most ordinary instance being that of a contract for several years' services not fully carried out, an action will lie for compensation for services actually rendered, and on the *quantum meruit*.(q)

Especially where the plaintiff has entirely performed his part of the agreement.(r)

The suit is not on the special contract.(s) And evidence of the special contract is not according to the weight of authority admissible for any purpose.(t) A recovery as upon a *quantum meruit* has been allowed, though the suit was in form on the special contract.(u)

(p) *Scarbrick v. Parkinson*, 20 L. T. N. S. 175 (Exch.)

(q) *Snelling v. Huntingfield*, 1 C. M. & R. 20; 4 Tyrwhitt, 606; *Brittain v. Rossiter*, 48 L. J. Exch. 362; 40 L. T. N. S. 240; 27 W. R. 482. See *Farlington v. Donohoe*, 14 W. R. 922; 1 Ir. R. C. L. 675; *Patten v. Hicks*, 43 Cal. 511; *Hambell v. Hamilton*, 3 Dana, 501; *Davenport v. Gentry*, 9 B. Mon. 427; *Quackenbush v. Ehle*, 5 Barb. N. Y. 469; *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 221; *McGluckey v. Bitter*, 1 E. D. Smith, 618; *Lockwood v. Barnes*, 3 Hill, 128; *Nones v. Horner*, 2 Hilt, 116; *McKinney v. McKinney*, 8 Daley, 369; *Oddy v. James*, 48 N. Y. 685; *Towsley v. Moore*, 30 Ohio St. (Comm.) 185; *Thouvenin v. Lea*, 26 Tex. 613. See on this question generally, *Wood on Mast. & Serv.* § 192, &c.

(r) *Towsley v. Moore*, 30 Ohio (Comm.) St. 185; see *Davenport v. Gentry*, 9 B. Mon. 427; *Quackenbush*

v. Ehle, 5 Barb. 469; *Pitkin v. Long Isl. R. R.*, 2 Barb. Ch. 221.

(s) *Treadway v. Smith*, 56 Ala. 345; *Wilson v. Pray*, 13 Ind. 1; *Marcy v. Marcy*, 9 Allen, 8; *Hill v. Hooper*, 1 Gray, 133; *Whipple v. Parker*, 29 Mich. 371; *Emery v. Smith*, 46 N. H. 151; *McGluckey v. Bitter*, 1 E. D. Smith, 618; *Little v. Wilson*, 4 E. D. Sm. 422; *Broadway v. Getman*, 2 Denio, 87; *King v. Brown*, 2 Hill, 485; *Pierce v. Paine*, 28 Vt. 37.

(t) *Rodman v. Woolman*, 2 Houst. (Del.) 581; *McGartland v. Stewart*, Id. 277; *Kleeman v. Collins*, 9 Bush, 460; *Emery v. Smith*, 46 N. H. 151; *Towsley v. Moore*, 30 Ohio (Comm.), 185, citing and considering many cases, and doubting *Swanzy v. Moore*, 22 Ill. 65; *Butcher Steel Works v. Atkinson*, 68 Ill. 423; considering *Swanzy v. Moore* and *King v. Brown*. See *Jones v. Hay*, 52 Barb. 507; *Spencer v. Halstead*, 1 Den. 606.

(u) *Knowlman v. Bluett*, L. R. 9

In some cases doubts have been expressed upon the above points. Thus in *Boydell vs. Drummond* (v) it was asked whether if, on an incomplete performance, an action *pro tanto* would not lie in spite of the Statute of Frauds; and in a later case, whose facts were of the same general character, recovery was allowed for those numbers of a book published in parts, which had been received and taken by the subscriber.(w) And in the cases below, the point as to recovery, whether upon a *quantum meruit* or on the special contract, was raised and not settled.(x)

It has been suggested hesitatingly in some cases, that the special contract formed the standard for measuring the damages,(y) especially where the agreement is fully executed.(z) Where the contract was that the defendant should be given an interest in a company estimated to be worth \$3000, and after three years' business he was to pay what it was worth, this contract is within the Statute of Frauds. Parol evidence of the special contract was admitted to show that this interest was valued at a certain amount if the special contract having been carried out should make it worth that, and that it might be worth less. But that the plaintiff could not prove the special contract to recover more than the \$3000.(a)

In the cases below the recovery was allowed as on the special contract which was made the measure of damage.(b) In Vermont it has been suggested that the recovery was on a *quantum meruit*, and if brought against the party who was to perform *infra annum*, the consideration reserved in the special contract might be recovered.(c)

§ 625. Money advanced or the value of labor given under a

Exch. 307; 43 L. J. Exch. 151; 10 (a) *Whipple v. Parker*, 29 Mich. 371.
Moak (n.), 467. (b) *Nones v. Homer*, 2 Hilt. 116;

(v) 11 East, 142; 2 Campb. 157. *McGlukey v. Bitter*, 1 E. D. Smith, 618;

(w) *Mavor v. Pyne*, 11 Moore, 2; see *Kelly v. Terrell*, 26 Ga. 552; *Hill v. Sherman v. Champlain Co.*, 31 Vt. 182. *Hooper*, 1 Gray, 133; *Philbrook v.*

(x) *Tague v. Haywood*, 25 Ind. 427; *Belknap*, 6 Vt. 386; *Duff v. Snider*, 54 Miss. 251.

Lockwood v. Barnes, 3 Hill (N. Y.), 54 Miss. 251. (c) See *Pierce v. Paine*, 28 Vt., 36; *Sheehy v. Adarene*, 41 Vt. 541; 8

(y) *Davies v. Appleton*, 25 U. C. C. P. 381; *Ryan v. Dayton*, 25 Conn. 191. *Amer. L. Reg. N. S.* 337; *Broadwell v. Getman*, 2 Den. 88. And see *Duff v.*

(z) *King v. Welcome*, 5 Gray, 42 *Snider*, 54 Miss. 251.
(dictum).

Further as
to the com-
mon counts. rescinded oral contract within the Statute of Frauds,
may be recovered under the common counts in *assump-
sit*.(d) The rule applies to contracts made with officers
of the United States and required by the act June 2d, 1862, to be
in writing.(e)

In a Michigan case the "equitable count for money had and received" is spoken of as the appropriate remedy.(f) Where the special contract is within the Statute of Frauds, the remedy and the only remedy is on the implied promise.(g) To recover a specific chattel, as will be seen later, there is another mode of recovery; and where under an exchange one conveys his tract and the other party rescinds, the former may recover the price or value of the land, but no action for money had will lie,(h) and a vendee upon failure of the vendor to properly convey cannot in *assumpsit* recover the purchase-money paid, if there is the appropriate covenant in a deed made between the parties.(i)

Where there were no common counts and no right of amendment (before English Common Law Procedure Act 1854), compensation could not be granted.(j) In a California case not arising under the Statute of Frauds it was said that "Where the entire performance of a special contract has been prevented by one of the parties, or when its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of *indebitatus assumpsit* and not upon the contract."(k)

In a recent Massachusetts case it was said that "An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the Statute of Frauds, and

(d) *Hunt v. Sanders*, 1 Marsh. 553; (e) *Clark v. United States*, 95 U. S. Allen v. Booker, 2 Stew. 24; *Jellison v. 541.*
Jordan, 68 Me. 374; *Hilton v. Duncan*, 1 (f) *Davis v. Strobridge*, 44 Mich. Cold. 313; *Naftzinger v. Roth*, 9 W. N. 159.
C. 495; 93 Pa. St. 448; *Rickard v. Stan-* (g) *Atwood v. Fox*, 30 Mo. 499.
ton, 16 Wend. 26; *Day v. N. Y. R. R.*, (h) *Basford v. Pearson*, 9 Allen, 390; 51 N. Y. 590; *Bartlett v. Wheeler*, 44 but see *Smith v. Hatch*, 46 N. H. 146.
Barb. 162; *Packer v. Stewart*, 34 Vt. 130; (i) *Tune v. Rector*, 21 Ark. 283.
Mackubin v. Clarkson, 5 Minn. 253; (j) *Cocking v. Ward*, 1 C. B. 867, as
Williams v. Bemis, 108 Mass. 92; explained in *Pulbrook v. Lawes*, 1 Q. B. Watson v. Watson, 1 Houst. 211; *Hill D. 288; 45 L. J. Q. B. 179.*
v. Stanton, 2 U. C. Q. B. 149. See (k) *Reynolds v. Jordan*, 6 Cal. 111.
Wood on Mas. & Serv., § 193, p. 375-6.

which the other party refuses to perform. An action would also lie for the return of any article delivered, or for payment for labor and services rendered, upon such an agreement and under such circumstances. Certainly so much as has been expended by the plaintiff in money or labor may be recovered in an action for money paid, or for work and labor done for the defendant.”(l) And *indebitatus assumpsit* is the action by which a vendor can recover against a vendee for use and occupation under an oral sale or lease.(m) Or where, under an exchange, one tract exchanged was sold to a third party by the recipient of it.(n) This is at law; the remedy at equity will be presently considered.(o)

In an Indiana case it was said that where a legal contract has so far been performed that upon its rescission the parties are not *in statu quo*, a party to it who rescinds because of the failure of the other side to carry out the agreement, cannot recover, under a general *assumpsit*, the consideration which he has paid, but must bring his action on the special contract. Such being the general rule, it was said that these observations did not apply to contracts invalid under the Statute of Frauds.(p)

§ 626. There is also a recovery in equity for compensation, as we have seen already, and a lien for the amount has often been given.(q) In Virginia the same rule was declared, part of the court dissenting.(r) In a Maryland case the lien was said to be allowed in some cases.(s)

The recovery in equity; how far a lien is given.

In Tennessee it has been held that payments made under an oral

(l) *Williams v. Bemis*, 108 Mass. 92, 218; *McNamee v. Withers*, 37 Md. 177; *Cooper v. Merritt*, 38 Ark. 692 citing many cases.

(m) *Wells v. Deming*, 2 Root, 149; *King v. Woodruff*, 23 Conn. 60; *Smith v. Smith*, 4 Dutch. 208; *Little v. Martin*, 3 Wend. 219.

(n) *Smith v. Hatch*, 46 N. H. 146; but see *Basford v. Pearson*, 9 Allen, 390.

(o) *Burdon v. Barkus*, 4 DeG. F. & J. 47; *Kidder v. Hunt*, 1 Pick. 328; *Parker v. Parker*, 1 Gray, 409.

(p) *Barickman v. Kuykendall*, 6 Blackf. 22.

(q) *Aday v. Echols*, 18 Ala. 357; see *supra*; *King v. Thompson*, 9 Peters,

218; *McNamee v. Withers*, 37 Md. 177; *Cooper v. Merritt*, 38 Ark. 692 (citing cases); *Campbell v. Campbell*, 3 Stockt. 278; *Hilton v. Duncan*, 1 Cold. 313; *Rhea v. Allison*, 3 Head, 178; *Clough v. Clough*, 3 B. Mon. 66; *Madeira v. Hopkins*, 12 B. Mon. 604; *Rucker v. Abell*, 8 B. Mon. 568; *Brown v. East*, 5 T. B. Mon. 408.

(r) *Anthony v. Leftwich*, 3 Rand. 244.

(s) *McNamee v. Withers*, 37 Md. 177, citing *King v. Thompson*; but see *Wilson v. Miller*, 30 Md. 89.

contract of land constitute no lien upon the land, so as to justify its sale in chancery to repay the advancements.(t) The amount of compensation due for acts of part performance done will in partition be made a lien, as part of the price advanced in payment under the purchase by one tenant of the interest of the other.(u)

As to how far and by what action compensation is to be had for acts of part performance under an oral contract not to be performed within a year, see the chapter relating to that clause of the Statute of Frauds.

§ 627. The suit for money paid is *assumpsit* for money had and received; for chattels delivered the remedy is trover or detinue; and for labor, a *quantum meruit*.(v) Recovery may be had on the implied promise for goods delivered, but not on the express agreement invalid because oral.(w)

Where the recovery of a chattel delivered under an invalid sale of land, the remedy is not *assumpsit* but trover, detinue, or replevin.(x) Where a chattel is transferred as part of the price of land orally sold, the person receiving it is a depositary; and, the parol contract being mutually abandoned, must return the article, but is not liable for its price or value unless he converts it to his own use.(y)

Where the plaintiff, the vendee of land, has rescinded and is seeking to get compensation for a watch delivered by him to a vendor willing to complete the contract, the plaintiff, if he has any right of recovery at all, cannot recover the value of the watch as the vendor's property, but must claim it as his own in trover or detinue.(z) Where, however, in the other event, the plaintiff, the vendee, is in no default and the vendor rescinds, the former may treat the chattel delivered under the oral sale of land as vested in the vendor, and can recover its value in an action for money had or goods sold.(a)

Under an oral agreement to give a right to enter land and cut timber, the seller is liable for timber actually cut and taken in an

(t) *McNew v. Tobey*, 6 *Humphr.* 27; *v. Patton*, 2 *Stew.* 33; *Duncan v. Baird*, see also *Hilton v. Duncan*, *supra*, distinguishing *McNew v. Tobey*. 8 *Dana*, 101.

(u) *Campbell v. Campbell*, 3 *Stockt.* 278.

(v) *Shreve v. Grimes*, 4 *Litt.* 223; as to the recovery of chattels see also *Keath*

(w) *Atwood v. Fox*, 30 *Mo.* 499.

(x) *Duncan v. Baird*, *supra*; *Updike v. Armstrong*, 4 *Ill.* 565.

(y) *Orand v. Mason*, 1 *Swan*, 196.

(z) *Duncan v. Baird*, *supra*.

(a) *Hawley v. Moody*, 24 *Vt.* 603.

action for goods sold and delivered.(b) Where a vendor recedes from his bargain he is liable on the common counts in *assumpsit* for money and cattle given him as the price of the land; and even the cattle can be treated by the vendee as having passed under an implied sale.(c) The value of the goods delivered may be recovered;(d) and where the vendor in rescinding retains the chattel, he is liable to pay for it the price stipulated in the oral contract, though in rescinding he might have tendered back the chattel.(e) Where the buyer under an oral sale of chattels takes the goods and sells them, an action for money will lie on behalf of the original owner; but not an action for goods sold.(f) Though an invalid contract for the sale and agistment of cattle might be inseverable, yet a *quantum meruit* could lie for the agistment.(g)

§ 628. Where the defendant has rescinded and set up the Statute of Frauds, the plaintiff can recover, as compensation and to put him *in statu quo*, the money he has paid to the defendant; the value of his labor and of his improvements; his costs, if any, and damages generally.(h) And this is the rule in equity also.(i) First, the money paid can be recovered;(j) as when paid to procure an instrument which proved

Measure of
damages—
money paid.

(b) *Murray v. Gilbert*, 1 Hann. (N. B.) 555.

(c) *Hill v. Stanton*, 2 U. C. Q. B. 149.

(d) *Sailors v. Gambriel, Smith* (Ind.) 82.

(e) *Miller v. Jones*, 3 Head, 525.

(f) *Hollins v. Morris*, 2 Harring. 3.

(g) *Harman v. Reeve*, 18 C. B. 595; 25 L. J. C. P. 257.

(h) *Allen v. Booker*, 2 Stew. 21; *Lyon v. Annable*, 4 Conn. 350; *Trinkle v. Reeves*, 25 Ill. 215; *Bedinger v. Whit-tamore*, 2 J. J. Marsh. 552; *Madeira v. Hopkins*, 12 B. Mon. 604; *Holbrook v. Armstrong*, 1 Fairfield, 31; *Richards v. Allen*, 17 Maine, 296; *Bowie v. Stone-street*, 6 Md. 418; *Kidder v. Hunt*, 1 Pick. 328; *Sherburne v. Fuller*, 5 Mass. 138; *Parker v. Parker*, 1 Gray, 409; *Williams v. Bemis*, 108 Mass. 92; *Riley v. Williams*, 123 Mass. 509; *Taylor v. Read*, 19 Minn. 375; *Hairston v. Jau-don*, 42 Miss. 330; *Lane v. Shackford*,

5 N. H. 132; *Luey v. Bundy*, 9 N. H. 298; *Merithew v. Andrews*, 44 Barb. 200; *Smith v. Smith*, 4 Dutch. 217; *El-lis v. Ellis*, 1 Dev. Eq. 399; *Bell v. An-drews*, 4 Dall. 153; *Newman v. Carroll*, 3 Yerg. 26; *Hilton v. Duncan*, 1 Cold. 313; *Winters v. Elliott*, 1 Lea (Tenn.), 676; *Reynolds v. Johnston*, 13 Tex. 214; *Patrick v. Roach*, 21 Tex. 253; *Sutton v. Sutton*, 13 Vt. 71; *Anthony v. Left-wich*, 3 Rand. 255; *Clark v. Davidson*, 10 Nor. West. Rep. 384 (S. C. Wis.) See 2 Am. Lead. Cas. (5th ed.) 192.

(i) *Force v. Dutcher*, 3 C. E. Green, 401; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Dunn v. Moore*, 3 Ired. Eq. 364.

(j) *Riley v. Williams*, 123 Mass. 509; *Fuller v. Reed*, 38 Cal. 99; *Hilton v. Duncan*, 1 Coldw. 318; *Seymour v. Ben-net*, 14 Mass. 268; *Buck v. Waddle*, 1 Ohio (Hamm.), 363; *Tune v. Rector*, 21 Ark. 283; *Davis v. Strobridge*, 44 Mich. 159.

ineffectual—either as a deed or as the memorandum required by the Statute of Frauds.(k)

Where a claim of an equitable mortgagee fails because of the Statute of Frauds, the claimant, though denied specific performance and any priority of right, may get a *pro rata* share with other creditors.(l) So money paid as boot or earnest.(m)

Where, upon a parol agreement for the exchange of lands being made, the plaintiff delivered to the defendant a promissory note made by X., and the defendant received payment of it, it was held that the plaintiff could recover the amount thereof; the delivery of the notes being without consideration, the agreement relating to the exchange of land being void under the Statute of Frauds,(n) and the vendor has sometimes been charged with interest on purchase-money received by him.(o) The vendee can recover money paid without tendering the unpaid balance or demanding title; the vendee, as was shown by the vendor's answer, had no longer possession of the land.(p)

§ 629. The vendee, as has been said, can also recover the value of his labor;(q) the jury being the persons to decide what such services may reasonably be worth (r) And a recovery may be allowed for the vendee's trouble, loss of time, and his expenses incurred upon the belief that the contract would be carried out; among other expenses was that of moving his family upon the land.(s) A tenant who repairs a building in consideration of a lease of it can recover the value of the repairs if the lessor setting up the Statute of Frauds refuses the lease.(t)

In a Tennessee case it was said that a vendee could not recover at law for his labor, but might in equity for the improved value of

(k) *Parker v. Parker*, 1 Gray, 409.

(l) *Nelson v. Hagerstown Bank*, 27 Md. 72.

(m) *Green v. Shackleford*, 2 A. K. Mar. 252.

(n) *Rice v. Peet*, 15 Johns. 503.

(o) *Davis v. Strobridge*, 44 Mich. 159; *Winters v. Elliott*, 1 Lea, 676; *Hurd v. Denny*, 16 Ill. 492, citing cases; especially where he administered to the

vendee's estate; *Webb v. Webb*, 6 Mon. 166.

(p) *Bennett v. Phelps*, 12 Minn. 332.

(q) *Riley v. Williams*, 123 Mass. 509; *Seymour v. Bennett*, 14 Mass. 268; *Fuller v. Reed*, 38 Cal. 99; *Bellamy v. Ragdale*, 14 B. Mon. 366; *Rickard v. Stanton*, 16 Wend. 26.

(r) *Watson v. Watson*, 1 Houst. 211.

(s) *Welch v. Lawson*, 32 Miss. 170.

(t) *White v. Wieland*, 109 Mass. 291.

the land.(u) And it is plain that recovery will not be given twice for the same cause of action, and therefore if the labor has gone in improvements, both cannot be elements of damages. As we have seen, improvements as well as labor done are a subject of compensation.(v) Thus crops sown and cultivated by the vendee, but from which he got no benefit owing to the vendor's rescission of the contract.(w)

A vendee who has improved land under an oral contract of purchase repudiated by the vendor cannot, it has been held in Tennessee, recover at law for work and labor, but must sue in equity for the improved value of the land.(x) The right to recover for money paid and for labor done for the vendor being admitted in a New Jersey case, a distinction was made as to improvements, and the right to recover compensation for the latter was denied, at least at law, because they were not made at the request or for the benefit of the vendor.(y) Where the vendee submitted, though it seems under protest, to a rescission of the contract, it was held that he could not recover for his improvements, because these were made for his own benefit, and because there was no stipulation as to their repayment, nor even an implied obligation on the vendor's part.(z) Recovery may be had both for money paid and improvements made.(a) Compensation for improvements is given also under the civil law.(b)

The enhancement in value of the land is the standard by which to measure the value of the improvements,(c) and not their cost.(d) and lastly, the vendee can recover compensation for his damages generally, that is, for losses actually incurred.(e)

§ 630. But the vendee can recover no damages for the loss of the bargain.(f) The ordinary rule under the Statute of ^{Not for loss} Frauds is certainly that the invalid oral contract cannot of bargain.

- (u) *Mathews v. Davis*, 6 Humphr. 327.
- (v) *Patrick v. Roach*, 21 Tex. 253;
- (w) *Wiley v. Bradley*, 60 Ind. 63,
- (x) *Mathews v. Davis*, 6 Humphr. 327.
- (y) *Smith v. Smith*, 4 Dutch. 217.
- (z) *Gillet v. Maynard*, 5 Johns. 85.
- (a) *Fox v. Longley*, 1 A. K. Marsh. 388; see also *Rob. & Jos. U. C. Dig.*, p. 2338.
- (b) *Daquin v. Coiron*, 6 Mart. N. S. 679.
- (c) *Masson v. Swan*, 6 Heisk. 455;
- (d) *Hawkins v. Beal*, 4 Dana, 6; *Glass v. Abbott*, 6 Bush, 623; *Daniel v. Crumpler*, 75 N. Car. 186.
- (e) *Barickman v. Kuykendall*, 6 Blackf. 22; *Anthony v. Leftwich*, 3 Rand. 244.
- (f) *Allen v. Booker*, 2 Stew. 21; *Lyon*

be used as a standard whereby to measure the damages in the case of compensation;(g) though there is a great conflict of decision on the point, and in the special instance of compensation for acts of part performance done under an oral contract relating to land evidence of the contract has been ruled out.(h)

By statute in Kansas, contracts with school teachers must be in writing, but one engaged orally can recover for reasonable value.(i) But on the other hand, it has been held in the case of a contract extending over several years in consideration of an advantage currently enjoyed, the stipulated compensation for the advantage actually had can be recovered.(j)

In Kentucky, though no rent can be recovered on an oral lease even executed, yet in a suit for use and occupation the lease is admissible to prove the damages.(k) And so where under an agreement with the United States, the latter, though not bound because the contract is oral, will, in absence of other evidence of the value of the consideration, be required to pay for such consideration enjoyed the price stipulated for in the oral contract.(l)

§ 631. In a suit by the vendee for compensation, rents due the vendor, or the value of profits enjoyed by the vendee, will be deducted.(m) In a recent Illinois case it was said, speaking of a vendee appellee: "He, by agreeing to purchase and entering into possession under appel-

Set-off; and mutual claims as to compensation.

v. Annable, 4 Conn. 350; *Bedinger v. Whittamore*, 2 J. J. Marsh. 552; *Holbrook v. Armstrong*, 1 Fairfield, 31; *Richards v. Allen*, 17 Me. 296; *Sherburne v. Fuller*, 5 Mass. 138; *Kidder v. Hunt*, 1 Pick. 328; *Parker v. Parker*, 1 Gray, 409; *Williams v. Bemis*, 108 Mass. 91; *Hairston v. Jaudon*, 42 Miss. 380; *Welch v. Lawson*, 32 Miss. 170; *Lane v. Shackford*, 5 N. H. 132; *Luey v. Bundy*, 9 N. H. 298; *Ellis v. Ellis*, 1 Dev. Eq. 399; *Bell v. Andrews*, 4 Dall. 153; *Hilton v. Duncan*, 1 Cold. 313; *Newman v. Carroll*, 3 Yerg. 26; *Anthony v. Leftwich*, 3 Rand. 255; see chapter on "Land."

(g) See chapter on "Land."

(h) *Lealie v. Smith*, 32 Mich. 67.

(i) *Jones v. School District*, 8 Kan. 364.

(j) *Sherman v. Champlain Transportation Co.*, 31 Vt. 162.

(k) *Morehead v. Watkyns*, 5 B. Mon. 229.

(l) *Clark v. United States*, 95 U. S. S. C. 541.

(m) *Madeira v. Hopkins*, 12 B. Mon. 604; *Reed v. Lander*, 5 Bush, 22; *Thompson v. Mason*, 4 Bibb, 196; *Rucker v. Abell*, 8 B. Mon. 568; *Hawkins v. Beal*, 4 Dana, 6; *McCampbell v. McCampbell*, 5 Litt. 92; *Day v. N. Y. R. R.*, 51 N. Y. 590; *M'Cracken v. Sanders*, 4 Bibb, 511; *Ridley v. McNairy*, 3 Humph. 177; *Rhea v. Allison*, 3 Head, 178; *Masson v. Swan*, 6 Heisk. 455; *Patrick v. Roach*, 21 Tex. 253; *Payne v. Graves*, 5 Leigh, 561; *Clark v. Davidson*, 10 Nor. West. Rep. 384.

lants, thereby acknowledged that they were the owners of the land. He also knew that they or he might at any time change his relation from that of an occupant as a purchaser to that of a tenant at will, liable to account for rents. It is unjust for the appellee to hold this land for years under the contract, such as it was, and then escape from paying for what he has received to his profit and benefit; and unless evicted by a paramount title and a liability to account for the rents to the true owner, he is liable to account to his vendor for its use.”(n)

Where the vendee under an oral sale refuses a deed, renounces the contract, and abandons possession, he is liable for use and occupation;(o) in a suit on a *quantum meruit* for services given in consideration of receiving a conveyance of land, the value also of the use and occupation generally is to be allowed the defendant;(p) and it is not necessary to plead a set-off.(q) And both tenants(r) and vendees are liable, certainly where it is the vendee who rescinds, setting up an outstanding title.(s) And any payment made by the defendant will enure *pro tanto* as an extinguishment of the plaintiff’s claim.(t)

In a Kentucky case the vendor was allowed interest on the unpaid price and has an allowance for waste, and is charged with improvements, and so the account is settled; the vendor under the contract had a right to rescind if the price was not promptly paid; and he did so rescind.(u) The vendor has been charged with interest on the purchase-money received, but allowed rent.(v) Where the vendee gave a note for part of the purchase-money and took possession he could not claim interest, nor was he chargeable for rent, except from the date when the vendor repudiated the contract.(w)

The law is well stated in the following opinion: “There ought to have been an account taken of the rents and profits, and the amount thereof deducted from the amount of the value of the improvements. As, however, the complainant most clearly obtained the possession in good faith, under a fair contract of pur-

(n) *Collins v. Thayer*, 74 Ill. 140, citing *Whitney v. Cochran*, 1 Scam. 209.

(o) *Davidson v. Ernest*, 7 Ala. 819.

(p) *Richards v. Allen*, 17 Me. 298; *Ham v. Goodrich*, 37 N. H. 190.

(q) *Ham v. Goodrich*, 37 N. H. 190.

(r) *Whipple v. Parker*, 29 Mich. 371.

(s) *Whitney v. Cochran*, 1 Scam. 209.

(t) *Hunt v. Sanders*, 1 Marsh. 553.

(u) *Bellamy v. Ragsdale*, 14 B. Mon. 366; as to allowance for waste or deterioration from use, see *Stark v. Canady*, 3 Litt. 403.

(v) *Winters v. Elliott*, 1 Lea, 676.

(w) *Kay v. Curd*, 6 B. Mon. 102.

chase, he ought not to be accountable for rents until there was a denial of his right, or an assertion of title on the part of the vendor or his representatives. For as long as he was permitted to hold the possession without any denial of his right to do so on their part, their consent that he should enjoy the profits must be presumed. In this case there is no evidence of any denial of the complainant's right, or of an assertion of title on the part of the vendor or his representatives, until the answer in the cause was filed, relying on the statute against frauds and perjuries, and from that time ought the account for the rents and profits to commence. The decree is also erroneous in compelling the defendants to pay interest upon the money paid by the complainant from the time of payment. No interest should be given as long as the complainant was permitted to enjoy the land without being accountable for the rents, for the one is naturally the consideration of the other."^(x)

The vendee by parol of a crop of standing grass must allow the value of a part of it which he had taken, when he sues for the price paid to the vendor who rescinds the agreement.^(y) The right of the vendor, when sued for compensation, to an allowance for rents or for the value of the use has been doubted and even denied. In an early English case it was questioned, when an oral contract executed on one point and with enjoyment accordingly, whether this could be so far impeached as to lay the parties executing open to an account for the profits.^(z)

And even in Kentucky, where, as we have just seen, there has been a line of decisions supporting an allowance to the vendor for the use of the land, the rule does not extend to the case of an exchange, in which it was held that no rent will be charged but an account taken of the value of the improvements or of the deterioration by use and a balance struck.^(a) Nor does the rule apply to a gift.^(b)

It has been held that in Kentucky no rent can be recovered on oral lease even when executed, yet that in a suit for use and occupation the lease is admissible to prove the damages.^(c) And in

(x) *Fox v. Longley*, 1 A. K. Marsh. 388, citing *McCracken v. Saunders*, 4 Bibb, 511.

(y) *Watkins v. Rush*, 2 Lans. 234.

(z) *Lockey v. Lockey*, Prec. in Ch. 519.

(a) *Stark v. Cannady*, 3 Litt. 403; see *French v. Seely*, 7 Watts, 231.

(b) *James v. McKinsey*, 4 J. J. Marsh. 626.

(c) *Morehead v. Watkyns*, 5 B. Mon. 229. See "Voluntary Performance."

Kentucky the question of interest is resolved by holding that in absence of fraud the use of the price will be considered as equivalent to the use of the land.^(d) Where there has been no contract as to the rents, a vendor is liable for improvements, and cannot necessarily have an allowance for rents.^(e)

A vendor cannot, under cover of an injunction to stop a suit at law brought by the vendee for labor and improvements, obtain specific performance.^(f) The converse of the rule under consideration is true also; and where it is the vendor suing as for rent, compensation for improvements, &c., will be allowed as set-off,^(g) and where the vendor seeks his remedy in equity, the rule is the same.^(h)

(d) *Clough v. Clough*, 3 B. Mon. 66.

(e) *Thouvenin v. Lea*, 26 Tex. 612. In a Georgia case, *Dodgen v. Camp*, 47 Ga. 328, the court gave the following clear summary of the facts and brief statement of the law: "Where a parol contract is made for the purchase of land to be paid for by installments, and the purchaser entered into possession under the contract with a stipulation that if he should fail to pay the first installment when it became due then he was to pay \$50 as rent (for which he gave his note at the time he went into possession), but if he paid the installments promptly then no rent was to be charged, but his note was to be considered as for a part of the purchase-money; and the vendor died before the first payment fell due, whereupon his administrators, on tender of payment at the time appointed, refuse to accept the money as payment on the contract, and afterwards rent the land at public outcry to the said purchaser and receive \$50, subject to future adjustment between them, and subsequently receive from him through their attorney \$50.50, also to be accounted for, and the administrators finally concluded not to carry out the parol agreement of their intestate for the sale of the land, but sell it at an administrator's sale to the same purchaser, and require full payment of him

without allowing him any credit on the purchase-money for the amounts paid before the administrators' sale, retaining the whole of such payments as rent for the occupation of the land from the time the purchaser went into possession under the parol agreement until the administrators' sale; the purchaser is entitled to recover back the amount of his note given under the parol contract of sale. The purchaser having gone into possession under the parol agreement and given his note for \$50 to be treated as part of the purchase-money upon condition, and he having complied with the condition required, the vendor or his representatives must comply with the contract or repudiate it entirely; and if they repudiate it entirely it would be fraud upon the purchaser, who went into possession under the parol agreement to buy, to hold him liable for the rent of the land which he might, perhaps, have never consented to occupy but for the purchase held out to him. The administrators are, however, entitled to retain the amount of the rent due."

(f) *Printup v. Mitchell*, 17 Ga. 564.

(g) *Thompson v. Mason*, 4 Bibb, 196; *King v. Woodruff*, 23 Conn. 60; *Shreve v. Grimes*, 4 Litt. 223.

(h) *Thompson v. Mason*, 4 Bibb, 196.

Payment of part of the price in part performance is available at law in mitigation of damages.(i)

Where the plaintiff had conveyed a farm to the defendant on an oral promise by the latter to support him and give him as security a lease or mortgage of the farm, the plaintiff, upon a rescission or failure to perform on the defendant's part, can recover the value of the land, less the value of support furnished him by the defendant under the contract.(j)

(i) *Keeler v. Tatnell*, 3 Zab. 62.

(j) *Dix v. Marcy*, 116 Mass. 417.

CHAPTER XXIX.

PLEADING AND EVIDENCE UNDER THE HEAD OF PART PERFORMANCE.

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| <p>§ 632. Where part performance is set up there must be shown a concluded contract.</p> <p>§ 633. There must be shown a subject-matter, the consideration, &c.</p> <p>§ 634. The acts of part performance themselves as evidence.</p> <p>§ 635. Acts of part performance must</p> | <p>refer solely to the alleged contract.</p> <p>§ 636. Evidence of the contract must be clear.</p> <p>§ 637. The evidence of the acts of performance must be clear. Declarations of the party.</p> <p>§ 638. Pleading.</p> |
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§ 632. Where part performance is set up there must be shown the terms and conditions of a concluded contract.(a) For the part performance does not dispense with proof of the agreement claimed to have been partly per-

Where part performance is set up there must

(a) *Popham v. Eyre*, Lofft, 808; *Gunter v. Halsey*, Ambler, 586; *Farrall v. Davenport*, 3 Giff. 368; 8 Jur. N. S. 862; S. C. affirmed id. 1043; *Burdon v. Barkus*, 4 DeG. F. & J. 47; *Reynolds v. Waring*, Young, Exch. Ch. 346; *Toole v. Medlicott*, 1 Ball & B. 401; *King v. Thompson*, 9 Peters, 218; *Howe v. Hall*, 4 Ir. Rep. Eq. 252; *Orpen v. Moore*, 2 Jones (Ir.), 442; *Goodwin v. Lyon*, 4 Porter (Ala.), 297; *Townsend v. Houston*, 1 Harring. 540; *Gosse v. Jones*, 73 Ill. 510; *Padfield v. Padfield*, 92 Ill. 203; *Bohannon v. Bohannon*, 96 Ill. 595; *Cornellison v. Cornellison*, 1 Bush, 152; *Waters v. Howard*, 8 Gill, 277; *Wingate v. Dail*, 2 Harr. & J. 76; *Stoddert v. Tuck* (Executor of Bowie), 5 Md. 184, 4 Md. Ch. 475; *Semmes v. Worthington*, 38 Md. 298; *Chesapeake and Ohio Canal Co. v. Young*, 3 Md. 490; *Beard v. Linthicum*, 1 Md. Ch. Dec. 345; *Owings v. Baldwin*, 1 Md. Ch.

Dec. 120; *Worley v. Walling*, 1 Harr. & J. 203; *Simmons v. Hill*, 4 Harr. & McH. 257; *Shepherd v. Shepherd*, 1 Md. Ch. Dec. 244; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Reese v. Reese*, 41 Md. 559; *Finucane v. Kearney*, 1 Freeman Ch. (Miss.) 68; *Young v. Montgomery*, 28 Mo. 604; *Poland v. O'Conner*, 1 Neb. 50; *Evans v. Lee*, 12 Nev. 399; *Newton v. Swazey*, 8 N. H. 13, citing cases; *Wallace v. Brown*, 2 Stockt. 308; *Eyre v. Eyre*, 4 C. E. Green, Ch. 102; *Petrick v. Ashcroft*, 4 C. E. Green (N. J.), 339; *Smith v. McVeigh*, 3 Stockt. 239; *Campbell v. Campbell*, 3 Stockt. 278; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 280; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Rathbun v. Rathbun*, 6 Barb. 98; *Reynolds v. Dunkirk & State Line R. R.*, 17 Barb. 613; *Massey v. McIlwain*, 2 Hill, Ch. 426; *Wiseman v. Lucksinger*, 4 N. Y. 38; *Woods v. Farmare*, 10 Watts, 195; *Toe v. Toe*, 3 Grant (Pa.),

be shown a concluded contract. formed.(b) The oral contract to be specifically enforced must not, said Lord Hardwicke, be doubtful on a single point.(c)

"To make out his case complainant must show a contract, the terms of which are clear and complete, so that no reasonable doubt can exist respecting the enforcement of it according to the understanding of the parties, if enforcement shall seem to be equitable."(d) "The clearest evidence of the terms of the agreement must be furnished, and the mind of the court thoroughly satisfied of them, and the part performance relied upon to take the case out of the statute established to have been under and in pursuance of the agreement, before the court will interfere.(e)

It is a question for the jury whether there was a contract, and what that contract was.(f) The contract must be a definite one,(g) and be, as has been said, a concluded one and not a mere offer or treating,(h) or a mere inducement or expectation.(i)

The standard of proof has been laid down in many definitions, a notion of which can be gathered from the following citations. It has been said that there must be of the contract and of its terms clear, definite, and conclusive proof, leaving no *jus deliberandi* or *locus pœnitentiæ* ;(j) that the acts alleged to be in part performance should be clearly proved, and that the contract itself, as alleged,

74; Frye v. Shepler, 7 Pa. St. 91; Moore v. Small, 19 Pa. St. 461; McGibbeny v. Burmaster, 53 Pa. St. 332; Van Loon v. Davenport, 1 W. N. (Phila.) 320; Bush v. National Oil Refining Company, 1 W. N. (Phila.) 297; Overmyer v. Koerner, 2 W. N. C. 6; Charnley v. Hansbury, 13 Pa. St. 21; Rankin v. Simpson, 19 Pa. St. 471; Charnley v. Hansbury, 13 Pa. St. 16; Hugus v. Walker, 12 Pa. St. 174; Wible v. Wible, 1 Grant, Pa. 406; Sage v. McGuire, 4 W. & S. 228; Goucher v. Martin, 9 Watts, 106; Hart v. Carroll, 85 Pa. St. 510; 5 W. N. C. 376; Peckham v. Barker, 8 R. I. 17; Thomson v. Scott, 1 McCord, Ch. 38; Newman v. Carroll, 3 Yerg. 26; Taylor v. Ashley, 15 Tex. 50; Bracken v. Hambrick, 25 Tex. 408; Rowton v. Rowton, 1 Hen. & Mun. 98; Lester v. Lester, 28

Grattan, 737; Hazleton v. Putnam, 3 Chand. 128; Knoll v. Harvey, 19 Wis. 99; Purcell v. Miner, 4 Wall. 513; Cady v. Caldwell, 5 Day, 67.

(b) Rowton v. Rowton, 1 Hen. & Mun. 98.

(c) (Lord) Middleton v. Wilson, cited in Popham v. Eyre, Lofft, 801.

(d) Kinyon v. Young, 44 Mich. 340; see Wright v. Pucket, 22 Gratt. 374.

(e) Nicol v. Tackaberry, 10 Grant, Ch. 115.

(f) Detrick v. Sharrar, 10 W. N. Cas. 289, 95 Pa. St. 521.

(g) Pierce v. Catron, 23 Gratt. 597.

(h) Bertel v. Neveux, 39 L. T. N. S. 259.

(i) Semmes v. Worthington, 38 Md. 317.

(j) Purcell v. Miner, 4 Wall. 517.

should be established by clear and definite testimony, leaving no doubt or uncertainty as to the contract or any of its terms.^(k) Or again, the contract must be clearly proved to the satisfaction of the court, and must be clear, definite, and certain, both as to its terms and subject-matter;^(l) and on all these points the Statute of Frauds binds in chancery as at law.^(m)

And it has been said that a contract sought to be specifically enforced ought not only to be proved, but the terms of it should be so precise as that neither party can reasonably misunderstand them.⁽ⁿ⁾ The claim must not be a stale one,^(o) and no modification of the contract must have been intended.^(p) Where the evidence in fact showed a clear contract, it will not be ground of error that the court declined to charge the jury expressly that the acts of part performance should be clear and definite.^(q)

Where the plaintiff alleges one contract and the defendant another, there can be no specific execution on account of part performance.^(r) According to the modern rule the agreement must be clearly proved, and the court will not, as formerly, establish a contract *ex æquo et bono*.^(s) Though Lord Eldon, in a case in Vesey, said that he would try to ascertain the contract.^(t) It was said in a modern case that "Whatever the agreement may have been it has been part-performed, and we are bound therefore as far as may be possible to ascertain what the agreement was;" the Statute of Frauds had been relied on.^(u)

Where the plaintiff and the defendant gave each a different version of the contract, and the only evidence was an unsigned engrossed draft of the lease which was the subject of the agreement, the court took this as sufficiently supporting the plaintiff's contention, there being part performance on his part.^(v) Where the words of the alleged contract were, "will try to accommodate," spoken

(k) *Aday v. Echols*, 18 Ala. 355; see *Williams v. Morris*, 95 U. S. 456.

(l) *Cooper v. Carlisle*, 17 N. J. Eq. Ch. 530, citing cases.

(m) *Brewer v. Wilson*, 17 N. J. Eq. 170. 184.

(n) *Brown v. Lord*, 7 Or. 309, citing *Odell v. Morin*, 5 Or. 96.

(o) *Worley v. Walling*, 1 Harr. & J. 209; *Howe v. Hall*, 4 Irish Rep. Eq. 252.

(p) *Cusey v. Hall*, 81 Ill. 161.

(q) *Farley v. Eller*, 29 Ind. 325.

(r) *Ellis v. Ellis*, 1 Dev. Eq. 342.

(s) *Blanchard v. McDougal*, 6 Wis.

(t) *Boardman v. Mostyn*, 6 Ves. 469.

(u) *Burdon v. Barkus*, 4 DeG. F. & J. 47.

(v) *McFarlane v. Dickson*, 13 Grant, Ch. 277.

in answer to a certain offer, the court thought that a concluded agreement was not made out.(w) Greater certainty is required for specific performance than in an action for damages.(x)

§ 633. The subject-matter of the contract must be shown.(y) In the case of land the latter must be identified, its boundaries must be fixed, and the quantity of land ascertained.(z) Proof of a quantity of land estimated at fifty acres, the contract as alleged being for a hundred and fourteen, will not justify a decree of specific performance.(a)

In an Irish case, where the quantity of land sold was doubtful and the price not proved, a reference to take testimony was refused.(b) An insufficient memorandum may be made certain by the possession taken thereunder, and where the writing called for a tract of about three acres situate in a certain township, &c., evidence that the vendee took possession of and improved a tract of three acres should go to the jury.(c) And where the parties agreed as to everything except the duration of the lease in suit, oral proof was allowed at the Rolls to show this, there being part performance.(d) And where possession was taken under a writing describing "brewery and premises," oral evidence to show what passed under this description was admitted, the possession defining and supplementing the writing.(e)

The consideration of the contract or the price must also be shown.(f) Where the allegation was that the price was to be paid in five annual installments, and the proof was of four or five, specific performance was refused, though compensation was allow-

(w) *East Penn. R. R. v. Schollenberger*, 54 Pa. St., 144.

(x) *Foster v. Kimmons*, 54 Mo. 493; which see, for evidence held too uncertain.

(y) See § 632, n. (a).

(z) *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. Cas. 376; *Leslie v. Smith*, 32 Mich. 67; *Cooper v. Carlisle*, 17 N. J. Eq. 530. See *Collins v. Vandever*, 1 Ia. (Clarke) 576, and *McFerran v. Mont Alto Co.*, 76 Pa. St. 180, for an example of a sufficient ascertainment of the land by bounds, &c.

(a) *Pierce v. Catron*, 23 Gratt. 597.

(b) *Savage v. Carroll*, 1 Ball & B. 281.

(c) *Troup v. Troup*, 6 W. N. Cas. 90.

(d) *Morphett v. Jones*, 1 Swanst. 181 (Plumer, M. R.)

(e) *Cameron v. Spiking*, 25 Grant, Ch. 117.

(f) *Savage v. Carroll*, 1 Ball & B. 281; *Thomson v. Scott*, 1 McCord, Ch. 38; *Thornbury v. Bromfield*, 24 Ia. 92; *Greenlee v. Greenlee*, 22 Pa. St. 235; *Hart v. Carroll*, 85 Pa. St. 510; 5 W. N. C. 376; *Cooper v. Carlisle*, 17 N. J. Eq. 530. See also § 632, n. (a).

ed.(g) Where there was no direct evidence of the price being fixed *uno flatu* with the purchase, yet the receipt of a certain price as the payment of the purchase-money in full at a subsequent day, after a long and peaceful possession, is evidence that the parties have agreed upon the price.(h) And even where there was a dispute whether the price was fixed at a certain sum or at a reasonable amount, and the court were to find that no price was actually fixed, it was said in one case that a reasonable consideration was to be presumed.(i)

The price was held to be sufficiently ascertained where it was agreed that it was to be the same as that of the first lot sold in the vicinity, which sale took place before suit brought.(j) The time and manner of performance of the contract must also be shown.(k)

§ 634. The effect of the acts themselves of part performance as evidence is a question which must be taken up at an early stage of this subject, and it is by no means a simple one. A long-settled view of the matter has been to consider that the performance indicates that there must have been a contract to induce it, and then it has been the rule of equity that, following up the indication, oral evidence will be taken by a chancellor to ascertain what the contract really was.(l) But it is not so clear whether the part performance should not do more than merely indicate the contract, and there is authority that it should furnish actual evidence of the latter.(m)

It has been said that "it is not enough that the act of part performance is evidence of some agreement, but it must be unequivocal evidence of the particular agreement charged in the bill or answer.(n) Or that the part performance should indeed form part of the proof of the contract."(o)

(g) *Aday v. Echols*, 18 Ala. 357.

(h) *McFerran v. Mont Alto Iron Co.*, 76 Pa. St. 180; see *Devonshire (Duke of) v. Eglin*, 14 Beav. 534.

(i) *Collins v. Vandever*, 1 Ia. (Clarke) 576 (a *dictum*, however, as the Statute of Frauds was not set up).

(j) *Cunningham v. Brown*, 44 Wis. 78.

(k) See § 632, n. (a)

(l) *Rhodes v. Frick*, 6 Watts, 317; *Townsend v. Houston*, 1 Harring. 532,

citing *Boardman v. Mostyn*, 6 Ves. 469.

(m) *Smith v. Crandall*, 20 Md. 500; *Cole v. Potts*, 2 Stockt. (N. J.) 68; and see § 632, n. (a).

(n) *Williams v. Morris*, 95 U. S. 456, citing *Phillips v. Thompson*, 1 Johns. Ch. 131; *Blum v. Robertson*, 24 Cal. 142, citing cases.

(o) *Church v. Sterling*, 16 Conn. 400,

In an Indiana case the court observed that "It perhaps may be said that the contract between the parties, in order that possession under it may take the case out of the statute, must provide, either expressly or by implication, that the purchaser shall be entitled to the possession which is thus taken; for, if it does not, it can hardly be said that possession is taken pursuant to or by virtue of the contract. It is apparent that the complaint does not show such a taking of possession as will take the case out of the statute. It does not state that the possession was taken by virtue of the contract, or anything of equivalent import."(*p*) On the other hand, it has been decided that the part performance need not have been a term of the contract; it is enough that it is in consequence of it.(*q*)

And the best and most practical rule, and that as well supported by authority as any other, is the earlier one which regards the part performance as indicative of the existence of the contract, but no proof thereof. A late Missouri case states the point well in saying: "In some cases the mere act of taking possession may indicate the contract under which it is taken; but in most cases the act does not of itself establish the character of the contract under which possession is acquired. The usual order of introducing evidence is, however, reversed in bills for a specific performance, and the plaintiff is allowed first to show his possession and the circumstances attending it, in order to raise a presumption of some contract, but this contract must be ultimately proved, unless the possession alone proves that it is only consistent with the contract claimed, and that no other hypothesis would be able to account for it;" the court adding that if the acts of part performance are relied upon as the sole proof of the contract, they must be such as cannot be explained consistently with any other agreement than the one alleged.(*r*)

Under the Scotch law it is the rule that part performance (*rei interventus*) cannot be taken alone and held invalid, and the contract be taken alone and held invalid; because the part performance does not itself show the agreement.(*s*) In a late case Lord Shand

citing *Lyndsay v. Lynch*, 2 Sch. & Lef. 1, and other cases.

(*r*) *Sitton v. Shipp*, 65 Mo. 298.

(*p*) *Neal v. Neal*, 69 Ind. 422.

(*s*) *Bargaddie Coal Co. v. Wark*, 3 Macq. H. of L. Rep. 477. See 10 Amer.

(*q*) *Jennings v. Robertson*, 3 Grant, Jur. 298-9. Ch. 517.

said that the acts and circumstances of the party did not have to be proof of the oral contract, but only that these acts being clearly proved and the contract being clearly proved by other evidence it was sufficient, and thought that *Bargaddie Coal Co. v. Wark* went to this extent.^(t) His Lordship was of the opinion also that there was sufficient part performance in the shape of reliance upon the oral contract; the court, however, held that the part performance must be referable to the oral contract, and indicate an inconsistency between the acts of the party and the written contract in opposition to which the oral contract was set up.

In another case it was said that it was not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint or answer, as the case may be.^(u) As examples, the following may serve: Thus, where it was proved that a father had often said that he had given his son land, and the son took possession and made valuable improvements, the inference arose that there was a contract that the son might have the land if he improved it.^(v) On the other hand, acts of performance such as a change of residence and the expenditure of money were insufficient reasons for giving specific performance, though made by the defendant's inducement, if there was no proof of a promise to sell or give the land.^(w)

§ 635. The acts of part performance must be shown by the evidence to refer solely to the alleged contract, and these two principles (*i. e.* this and the rule that there must be proof of the contract) would seem to sufficiently define the rule without requiring the acts themselves to be proof of the contract.^(x) For examples of part perform-

Acts of part performance must refer solely to the alleged contract.

(t) *Kirkpatrick v. Allanshaw Coal Co.*, 18 Scotch Law Report. 212; the court, however, distinguishing *Bargaddie Coal Co. v. Wark* as a case of mere forgiveness by a landlord of a breach of the lease by the tenant.

(u) *Blum v. Robertson*, 24 Cal. 142.

(v) *Haines v. Haines*, 6 Md. 435.

(w) *Shropshire v. Brown*, 45 Ga. 179.

(x) *Cooth v. Jackson*, 6 Ves. Jr. 12; *Purcell v. Miner*, 4 Wall. 513; *Wil-*

liams v. Morris, 95 U. S. C. 456-7; *Cady v. Caldwell*, 5 Day, 87; *Townsend v. Houston*, 1 Harring. 532; *Shropshire v. Brown*, 45 Ga. 179; *Worth v. Worth*, 84 Ill. 442; *Long v. Duncan*, 10 Kan. 294; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Shepherd v. Bevin*, 9 Gill, 32; *Mundorff v. Kilbourn*, 4 Md. 459; *Stoddert v. Tuck*, 5 Md. 33; *Haines v. Haines*, 6 Md. 435; *Owings v. Baldwin*, 8 Gill, 356; *Worley v. Walling*, 1 Hare

ance which could not be sufficiently referred to the contract, see the cases in the note.(y)

§ 636. The evidence must be clear in any case whether the contract is gathered from the part performance itself or elsewhere.(z) Part performance going on the ground of fraud must be under the contract directly and clearly so, and the contract part-performed must be the same as that set up. An improvement made with a view to a present litigation is insufficient.(a) Though reasonable certainty may be enough,(b) the measure of certainty required is not a fixed one. Thus it has been said that, where the contract is within the clauses of the Statute of Frauds relating to contracts concerning land and relating to contracts not to be performed within a year, the court will be the more cautious in examining the evidence.(c)

And so evidence to show that E. E. made a bequest to E. F. upon an agreement that the latter should respect certain dispositions in E. E.'s will of her, E. F.'s, property, must if by parol be

& J. 208; *Whitridge v. Parkhurst*, 20 Md. 92; *Semmes v. Worthington*, 38 Md. 298; *Smith v. Crandall*, 20 Md. 500; *Hood v. Bowman*, 1 Freem. Ch. (Miss.) 290; *Poland v. O'Connor*, 1 Neb. 50; *Cole v. Potts*, 2 Stockt. Ch. 67; *Wallace v. Brown*, 2 Stockt. 308; *Force v. Dutcher*, 18 N. J. Eq. 401; *Niven v. Belknap*, 2 Johns. 587; *Rathbun v. Rathbun*, 6 Barb. 98; *Richmond v. Foote*, 3 Lans. 249; *Workman v. Guthrie*, 29 Pa. St. 495; *McGibbeny v. Burmaster*, 53 Pa. St. 332; *Ackerman v. Fisher*, 57 Pa. St. 457; *McElhenny v. Hope*, 25 Pittsb. Leg. Jour. (S. C. Pa.) 77; *Peckham v. Barker*, 8 R. I. 17; *Goodhue v. Barnwell*, Rice, Eq. Rep. 198; *Blanchard v. McDougal*, 6 Wis. 167.

(y) *Barnes v. Boston & C. R. R.*, 130 Mass. 389; *McIneres v. Hogan*, 61 How. Pr. 447; *Lord v. Underdunk*, 1 Sandf. Ch. 48; *Detrick v. Sharrar*, 10 W. N. Cas. 289, 95 Pa. St. 522.

(z) *Popham v. Eyre*, Loft, 808; *Cooth v. Jackson*, 6 Ves. Jr. 12; *Rey-*

nolds v. Waring, Young. Exch. Ch. 346; *Palmer v. White*, Wallis (Lyne), 10; *Rawlins v. Shropshire*, 45 Ga. 188; *North v. North*, 9 Chic. Leg. News, 396 (S. C. Ill.); *Padfield v. Padfield*, 92 Ill. 203; *Fairbrother v. Shaw*, 4 Ia. 571; *Long v. Duncan*, 10 Kan. 294; *Shepherd v. Shepherd*, 1 Md. Ch. 245; *Owings v. Baldwin*, 1 Md. Ch. 122; *Evans v. Lee*, 12 Nev. 399; *Tilton v. Tilton*, 9 N. H. 389; *Smith v. McVeigh*, 3 Stockt. 240; *Richmond v. Foote*, 3 Lans. 249; *Hart v. Carroll*, 85 Pa. St. 510, 5 W. N. C. 376; *Lowry v. Buffington*, 6 W. Va. 255; *Bowen v. Warner*, 1 Pinney, 605; *Blanchard v. McDougal*, 6 Wis. 170; *Tiernan v. Gibney*, 24 Wis. 193. See § 632, n. (a).

(a) *McMurtrie v. Bennett*, Harr. (Mich.) 126.

(b) *Neale v. Neales*, 9 Wall. 1; *Kurtz v. Hibner*, 55 Ill. 521; see as to the degree of proof, Story, Eq. Jur. (12th ed.) § 764.

(c) *Blunt v. Tomlin*, 27 Ill. 102.

very clear and definite, and the acts of part performance be clear and refer exclusively to the agreement to enable the disappointed legatee, J. J. F., to whom E. F.'s property had been left by E. E. to hold as against E. F.(d)

The proof again in the case of an exchange of land is less strict.(e) And where there had been a full payment of the consideration and forty years' possession, the strictness of proof is relaxed, and the following has been held to be too severe a rule, viz., that the plaintiff "must prove the contract clearly and satisfactorily in all its parts by witnesses who knew it by having heard it made or repeated in the presence of both parties. When proved it must have all the attributes of a good contract, clearly exhibiting the location, boundaries, and quantity of land, the price to be paid and manner of payment. The land must be so described that a third person could take the description, go to the ground, find and run its lines. The evidence must then show that the vendee took possession immediately or soon thereafter in pursuance of said purchase, which possession must have been actual, notorious, exclusive, and continuous, accompanied by improvements."(f)

A liberal disposition has been shown to charitable gifts.(g) While on the other hand the rule applied to oral gifts or sales made by parent to child is generally a severe one.(h)

Possession and improvements by a son of his father's lands is, without more, sufficiently accounted for by their relationship, and does not evidence of itself a sale or gift.(i) Vague declarations as to a gift are insufficient.(j) And this applies to the case where the alleged donor put his son and daughter-in-law into possession of the land.(k)

For examples of contracts or gifts between parent and child not considered as sufficiently proved, see the citations in the note below.(l) For examples of contracts regarded as clearly proved,

(d) *Whitridge v. Parkhurst*, 20 Md. 92; the suit was brought by a creditor of E. F. against vendees of J. J. F.

(e) *Reynolds v. Hewett*, 27 Pa. St. 176; *Moss v. Culver*, 64 id. 424.

(f) *Richards v. Elwell*, 48 Pa. St. 363.

(g) *McLain v. School Directors*, 51 Pa. St. 198.

(h) *Ackerman v. Fisher*, 57 Pa. St. 457; see *Miller v. Miller*, 60 Pa. St. 22.

(i) *Jones v. Tyler*, 6 Mich. 368.

(j) *Hugus v. Walker*, 12 Pa. St. 173.

(k) *Sower v. Weaver*, 1 W. N. C. 499, 78 Pa. St. 448.

(l) *Harris v. Richey*, 56 Pa. St. 401; *Worth v. Worth*, 84 Ill. 442; *Ackerman v. Ackerman*, 24 N. J. Eq. 316.

see the following cases.(m) For examples of contracts not regarded as clearly proved, see the following cases.(n)

§ 637. The acts of part performance must be proved by full and clear evidence.(o) Of course oral evidence is sufficient.(p) The acts of part performance do not require as much evidence as does the contract.(q) Preponderating evidence is enough.(r) The proof of the part performance must show it to be definite in its object.(s)

Among other proof, declarations of the parties are sometimes offered, and there is some inconsistency of ruling as to the competency of such testimony. It has been held that declarations of the vendor or of the vendee are evidence for the other respective party.(t) And declarations of a vendor under a parol contract of sale were held competent evidence, if the vendor could not be found, and the vendee had paid the purchase-money and taken

(m) *Langston v. Bates*, 84 Ill. 524; *Lobdell v. Lobdell*, 36 N. Y. 331; *Lafollett v. Kyle*, 51 Ind. 449; *Twiss v. George*, 33 Mich. 254; *Townsend v. Houston*, 1 Harring. 540.

(n) *Detrick v. Sharrar*, 10 W. N. Cas. 289, 95 Pa. St. 521; *Leslie v. Smith*, 32 Mich. 67.

(o) *Cooth v. Jackson*, 6 Ves. Jr. 12; *Purcell v. Miner*, 4 Wall. 513; *Blum v. Robertson*, 24 Cal. 142; *Cady v. Caldwell*, 5 Day, 67; *Townsend v. Houston*, 1 Harrington, 532; *Worth v. Worth*, 84 Ill. 442; *Williamson v. Williamson*, 4 Iowa, 279; *Long v. Duncan*, 10 Kan. 294; *Overstreet v. Rice*, 4 Bush, 3; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Shepherd v. Bevin*, 9 Gill, 32; *Mundorff v. Kilbourn*, 4 Md. 459; *Stoddert v. Tuck*, 5 Md. 33; *Haines v. Haines*, 6 Md. 435; *Owings v. Baldwin*, 8 Gill, 338; *Worley v. Walling*, 1 Harr. & J. 208; *Whitridge v. Parkhurst*, 20 Md. 92; *Semmes v. Worthington*, 38 Md. 298; *Shepherd v. Shepherd*, 1 Md. Ch. 245; *Smith v. Crandall*, 20 Md. 500; *Reese v. Reese*, 41 Md. 559; *Hood v. Bowman*, 1 Freem. Ch. (Miss.) 290;

Finucane v. Kearney, Id. 68; *Charpiot v. Sigerson*, 25 Mo. 60; *Poland v. O'Connor*, 1 Neb. 50; *Cole v. Potts*, 2 Stockt. Chanc. 67; *Wallace v. Brown*, 2 Stockt. 308; *Force v. Dutcher*, 18 N. J. Eq. 401; *Smith v. McVeigh*, 3 Stockt. 240; *Niven v. Belknap*, 2 Johns. 587; *Rathbun v. Rathbun*, 6 Barb. 98; *Richmond v. Foote*, 3 Lans. 249; *Aitkin v. Young*, 12 Pa. St. 15; *Hugus v. Walker*, 12 Pa. St. 174; *Charnley v. Hansbury*, 13 Pa. St. 16; *McCue v. Johnston*, 25 Pa. St. 306; *Wible v. Wible*, 1 Grant, Pa. 406; *Moore v. Small*, 19 Pa. St. 461; *Workman v. Guthrie*, 29 Pa. St. 495; *McGibbeny v. Burmaster*, 53 Pa. St. 332; *Ackerman v. Fisher*, 57 Pa. St. 457; *Peckham v. Barker*, 8 R. I. 17; *Goodhue v. Barnwell*, Rice, Eq. Rep. 198; *Lester v. Lester*, 28 Grattan, 737; *Blanchard v. McDougal*, 6 Wis. 167; *Bowen v. Warner*, 1 Pinney, 605.

(p) *Hall v. Hall*, 1 Gill, 387.

(q) *Long v. Duncan*, 10 Kan. 294.

(r) Id.

(s) See the cases cited *supra*.

(t) *Reed v. Reed*, 12 Pa. St. 117.

possession.(u) And declarations, though admitted to be unsatisfactory proof, should be admitted.(v) The evidence, indeed, when accompanied by acts of part performance was said in one Pennsylvania case to be good.(w) But loose declarations of a grantor are good only as corroborative.(x) Proof of the oral declarations of a decedent is to be received with caution.(y)

It has been said that the contract cannot be made out by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard or inaccurately remembered, perverted, or altogether fabricated; testimony therefore impossible to be contradicted.(z) Vague declarations are inadequate proof of an alleged gift of land.(a)

Declarations of a grantor after he had parted with his title are inadmissible to sustain a prior oral grant; and proof that the complainant in the grantor's presence, when the other sale was spoken of, only said, "I thought that land was for me," was considered insufficient to sustain the complainant's claim, and as indicating an expectation rather than a right.(b) The party's unsupported oath is in Texas not sufficient proof of a contract of sale of land, though accompanied by part performance, to allow specific performance.(c)

§ 638. The subject of pleading in connection with part performance can be given best under the former rather than the latter head; but even in the present chapter a few Pleading. points arising under the subject may be apposite.

There is authority, then, for requiring that a complainant in equity should in his bill, if he relies upon part performance, describe the acts which constitute the latter.(d) And the contract itself should appear in the pleadings with great distinctness and certainty.(e) The performance and notice of it to all the parties to be affected, must be stated and proved as stated.(f)

(u) *Gilday v. Watson*, 2 S. & R. 408.

(v) *Burns v. Sutherland*, 7 Pa. St. 106.

(w) *Clarke v. Vankirk*, 14 S. & R. 354.

(x) *McCue v. Johnson*, 25 Pa. St. 306.

(y) *Hood v. Bowman*, 1 Freem. Ch. (Miss.) 290.

(z) *Purcell v. Miner*, 4 Wall. 517.

(a) *Hugus v. Walker*, 12 Pa. St. 173;

see *Bailey v. Edmunds*, 64 Ill. 126.

(b) *Reese v. Reese*, 41 Md. 559.

(c) *Edwards v. Norton*, 48 Tex. 298.

(d) *Black v. Black*, 15 Ga. 450.

(e) *Magruder v. Campbell*, 40 Ala. 622.

(f) *Cady v. Caldwell*, 5 Day, 67.

Where the equities constituting the part performance are not alleged, the petition for specific performance is demurrable,^(g) and acts of part performance proved will not be regarded if not averred in the pleading.^(h) A complainant seeking specific performance must aver in his bill the facts showing a full compliance on his part with all the stipulations of the contract; and a general allegation "that he has offered and has always been ready and willing to comply with the contract," is not sufficient.⁽ⁱ⁾ But a plaintiff who has partly performed need not aver his willingness to complete; this is to be inferred from his bringing his bill.^(j) A bill, however, which states facts amounting to part performance is good though it does not expressly claim relief on that ground.^(k)

The following is an example of pleading which showed insufficiently the part performance relied on. Thus a complaint was insufficient which did "not show that the possession was taken and improvements made under the contract with the defendant, or that he had knowledge thereof or consented thereto. For anything to the contrary appearing in the complaint, the plaintiff may have been a trespasser in taking possession." Nor did it "show that the plaintiff was ready and willing to pay the balance of the purchase-money on receiving a decree ordered for the land."^(l) While the averment that the plaintiff took possession by virtue of the agreement, and that the defendant and his heirs had not had possession of any part of it since the agreement was made, is sufficient.^(m)

The plaintiff must allege the facts of part performance either in the original bill or after plea or answer in an amendment.⁽ⁿ⁾ And if the answer sets up the Statute of Frauds, the part performance must be averred in the bill;^(o) and a plaintiff in equity failing for want of the memorandum required by the statute, must if he relies on the part performance bring a new bill.^(p)

(g) *Wood v. Jones*, 35 Tex. 66.

(l) *Moore v. Higbee*, 45 Ind. 488.

(h) *Bomier v. Caldwell*, 8 Mich. 474.

(m) *Smith v. Underdunck*, 1 Sandf. Ch. 580, citing cases.

(i) *Hart v. McClellan*, 41 Ala. 251, citing cases.

(n) *Capehart v. Hale*, 6 W. Va. 550.

(j) *Hatcher v. Hatcher*, 1 McMull. Eq. 317.

(o) *Meach v. Perry*, 1 D. Chip. 182; *Cady v. Caldwell*, 5 Day, 67; *Wood v. Jones*, 35 Tex. 66.

(k) *Farquharson v. Williamson*, 1 Grant, U. C. 95.

(p) *Wood v. Jones*, 35 Tex. 64.

In Arkansas, a bill for specific performance must aver that the contract was in writing, or that there was part performance.(q) So also in Vermont.(r) In Indiana, where there has been part payment under an oral sale of goods, the complaint does not have to aver this.(s) Where the declaration avers facts constituting part performance, *assumpsit*, it has been said, will lie for owelty under an oral partition.(t)

In Wisconsin it has been held that the title arising from part performance can be specifically enforced by means of a counter-claim in favor of the defendant in an ejectment.(u) Where the bill said that the defendant entered as a tenant from year to year, and the answer said as tenant for a term of years under a verbal lease, the answer was held to be proof, not only of the contract but of the fact that the possession taken was in part performance thereof.(v) And where the plaintiff's proof varied from his bill and from the answer, Lord Loughborough once decreed the contract as averred by the answer, and put the costs on the plaintiff.(w)

Where a plaintiff set out his contract and his part performance, the defendant, who pleaded the Statute of Frauds and denied the existence of a writing, was ordered to answer as to the contract, and the plea was allowed to stand for an answer.(x) Where the facts are admitted by a demurrer, the court must determine whether the facts relied on constitute part performance.(y)

(q) Underhill v. Allen, 18 Ark. 466.

(r) Meach v. Perry, 1 D. Chip. 182.

(s) Harper v. Miller, 27 Ind. 281.

(t) Walter v. Walter, 1 Whart. 292.

(u) Ingles v. Patterson, 36 Wis. 377.

(v) Morrison v. Peay, 21 Ark. 110.

(w) Mortimer v. Orchard, 2 Ves. Jr.

253; see the note in Sumner's edition.

(x) Wills v. Stradling, 3 Ves. Jr. 381.

(y) Van Dyne v. Vreeland; 2 Stockt. 378; as to pleading part performance see Heythuysen, Eq. Draft. 597.

CHAPTER XXX.

VOLUNTARY OR FULL PERFORMANCE.

- § 639. Voluntary performance of the oral contract will satisfy the Statute of Frauds. General principles. Difference between full and part performance.
- § 640. Implied promises are not within Statute of Frauds. Examples of sufficient full performance.
- § 641. Insufficient memorandum may be supplemented by parol when there is voluntary performance; and examples of insufficient performance.
- § 642. The doctrine applied to contracts as to interest. Contracts with United States; leases; licenses; flowage; tithes, &c.
- § 643. Trusts.
- § 644. Joint contracts.
- § 645. Devise; guaranty; promissory note.
- § 646. Chattels; labor; marriage.
- § 647. Applied payments.
- § 648. When title to land vests in case of voluntary performance.
- § 649. The parties to an oral contract may voluntarily perform it. Statute of Frauds a shield not a sword; the oral contract not invalid.
- § 650. Oral contract can be performed as against volunteers; entire oral contract can be performed as against later written one.
- § 651. Third parties cannot set up the Statute of Frauds. General examples.
- § 652. Who need not or cannot set up the Statute of Frauds. Trustees; administrators; public officers.
- § 653. Creditor may fulfill the contract to the disadvantage of the debtor.
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- § 655. Garnishee can voluntarily perform.
- § 656. Vendor of land can perform.
- § 657. Further examples of voluntary performance good as against third persons; contracts in consideration of marriage.
- § 658. Price of land conveyed under oral sale may be recovered.
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- § 660. How far executor's oral stipulations are enforceable after title to land has been conveyed—as against vendee—as against vendor.
- § 661. Conveyance of one tract not a full performance of an exchange of lands.
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- § 665. Joint arrangement or trust.
- § 666. Promissory notes.
- § 667. How far a deed of writing is necessary. Delivery of deed how far sufficient.
- § 668. Delivery of deed insufficient.
- § 669. Acceptance of deed-poll makes the vendee liable for the stipulations therein.
- § 670. Stipulation to pay a mortgage.
- § 671. Stipulation to pay rent; taxes.

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| <p>The rule in partition or exchange, &c.</p> <p>§ 672. Stipulation to improve. Rule as to guaranties.</p> <p>§ 673. Practice and remedies.</p> <p>§ 674. <i>Assumpsit</i> on the implied contract not on special contract.</p> | <p>§ 675. Exceptions to the last rule.</p> <p>§ 676. Vendor's lien for purchase-money. Examples of <i>assumpsit</i>.</p> <p>§ 677. Year clause. Pleading generally.</p> |
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§ 639. A VOLUNTARY performance of an oral contract by the parties thereto will take it out of the Statute of Frauds.(a) The statute neither prevents an agreement from being executed nor annuls it thereafter.(b) The Statute of Frauds does not invalidate the contract, it only requires certain proof.(c) Earl Cairns in a late case drew a distinction between the effect of prescription upon the title to land where the mere effect of time had established the right and the effect of the Statute of Limitations, and the Statute of Frauds which may be waived by the parties.(d) It was said in California that past transactions under a contract within the Statute of Frauds would not be disturbed.(e)

Voluntary performance of the oral contract will satisfy the Statute of Frauds; general principles; difference between full and part performance.

The broad statement is true that after full or partial performance of an oral agreement the Statute of Frauds does not apply.(f) But the distinction between partial and entire performance is a radical one; the former rests on the ground of fraud and is a claim in equity upon the Chancellor's grace; the latter prevails at law as well, and is supported because there is no interest included in the purview of the Statute of Frauds which after such full performance remains executory so as to require enforcement by pro-

(a) *Andrews v. Jones*, 10 Ala. 401; *Godden v. Pierson*, 42 Ala. 374; *Aicardi v. Craig*, Id. 314; *Ruckle et al. v. Barbour*, 48 Ind. 280; *Goff v. Rogers*, 71 Ind. 462; *McCampbell v. McCampbell*, 5 Litt. 92; *Madeira v. Hopkins*, 12 B. Mon. 604; *Bucknam v. Nash*, 12 Me. 474; *Crane v. Gough*, 4 Md. 316; *Emmett v. Reed*, cited in *Westfall v. Parsons*, 16 Barb. 649; *Clancy v. Craine*, 2 Dev. Eq. 365; *Mushat v. Brevard*, 4 Dev. 76; *Uhler v. Farmers' National Bank*, 64 Pa. St. 409; *Sneed v. Bradley*, 4 Sneed, 301; *Williams v. Parish*, 6 Vt. 75.

(b) *Godden v. Pierson*, *Aicardi v. Craig*, *supra*.

(c) *Eiseley v. Malchow*, 9 Neb. 179; *Child v. Pearl*, 43 Vt. 224; see *Brown v. Frantum*, 6 La. 46.

(d) *Dawkins v. (Lord) Penrhyn*, L. R. 4 App. Cas. 58.

(e) *Pio Pico v. Cuyas*, 47 Cal. 174.

(f) *Andrews v. Jones*, 10 Ala. 401; *Rowland v. Gorman*, 1 J. J. Marsh. 76; *Crane v. Gough*, 4 Md. 316; *Brown v. Bellows*, 4 Pick. 189; *Stone v. Dennison*, 13 Pick. 6; *Mushat v. Brevard*, 4 Dev. 76; *Voluntine v. Godfrey*, 9 Vt. 190.

cess. A modern Massachusetts decision referring to the statute said: "The purpose of this celebrated enactment, as declared in the preamble and gathered from all its provisions, is to prevent fraud and falsehood, by requiring a party who seeks to enforce an oral contract in court, to produce, as additional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered.(g)

There are a number of instances in which the distinction between full and part performance has been overlooked, and the words used interchangeably; in a late English case the Exchequer Division thought certain performance valid full performance, while the Lords Justices, reversing the decision, held that there was not even sufficient part performance.(h) The principle of voluntary performance prevails under the civil law as enforced in Lower Canada and in Louisiana;(i) and even where the Statute of Frauds of the locality makes the oral contract not merely unenforceable but actually void, the parties can perform if they so desire.(j)

The doctrine of full performance has been stated in many forms; thus it has been said that the acts of the parties are better evidence than a writing;(k) or at least equivalent thereto.(l) The very idea of repudiation after actual performance is incongruous, said another authority.(m)

§ 640. When the contract is executed in whole or in part, and the action is brought not on the express but on the implied promise, the statute does not apply.(n) Promises implied by law are not

(g) *Townsend v. Hargraves*, 118 Mass. 323.

(h) *Alderson v. Maddison*, 7 Q. B. D. 174; 29 W. R. 556, reversing S. C. below, 5 Exch. D. 294.

(i) *Gagnon v. Fecteau*, 15 Low. Can. Rep. 89; *Baylis v. Ryland*, Id. 99; *Pew v. Livaudais*, 3 La. Ann. 460; *Jacob v. Davis*, 4 La. Ann. 39.

(j) *Gulley v. Macey*, 84 N. Car. 441; *Choat v. Wright*, 2 Dev. Law, 269 (the court saying that executed con-

tracts were not within the language of the statute, though the danger of perjury was as great as in the case of contracts merely executory).

(k) *Wilber v. Paine*, 1 Hamm. 252.

(l) *Boyce v. Berger*, 11 Neb. 401.

(m) *Mitchell v. McNab*, 1 Bradw. 299.

(n) *Roberts v. Tennell*, 3 T. B. Mon. 247; *Gully v. Grubbs*, 1 J. J. Marsh. 387; *Wetherbee v. Potter*, 99 Mass. 361; *Urquhart v. Brayton*, 12 R. I. 170 (citing cases).

within the Statute of Frauds.(o) If a contract, even one within the Statute of Frauds, is executed on one side, the law will infer a contract on the other; and *assumpsit* will lie on the implied contract.(p) Thus a promise by one excavating under the wall of a neighbor's house to pay for the damage, is not void as relating to an interest in land within the Statute of Frauds, because the promise amounts to no more than to do what the law would have required without the promise.(q)

Implied promises are not within the Statute of Frauds; examples of sufficient full performance.

When the part within the statute is executed the remainder can be sued on.(r) Indeed, recovery for acts of part performance (see "Part Performance") goes rather upon the ground of the implied promise to repay than directly upon the ground of fraud.(s) A person who is protected by the Statute of Frauds may exact money for his voluntary performance; and this paid cannot, it would seem, be recovered back.(t)

The following are a number of general examples of the application of the doctrine now under consideration. Thus, where it was agreed where the administrator, who was also guardian of the intestate's widow (the latter, who was insane, being entitled to a life interest in certain real estate which had belonged to the intestate), agreed with those in remainder to sell the land and to lend them the proceeds, on which they were to pay the guardian interest, giving a note for the sum so lent; it was held that the remaindermen were entitled to an injunction upon the guardian to prevent his parting with the note, and from collecting by suit more than merely the interest; the contract was considered as substantially executed.(u)

In a Louisiana case, it being doubtful whether an administrator could act as auctioneer, the court said: "It is unnecessary to con-

(o) *Providence &c. Union v. Elliott*, 22 Alb. L. J. 274 (S. C. R. I.); *Urquhart v. Brayton*, 12 R. I. 170; *Dow v. Way*, 64 Barb. 257; *Felch v. Taylor*, 13 Pick. 136.

(p) *Gully v. Grubbs*, 1 J. J. Marsh, 387.

(q) *Hayes v. Moynihan*, 60 Ill. 411.

(r) *Trowbridge v. Wetherbee*, 11 Allen, 364.

(s) *Parker v. Niggeman*, 6 Mo. App. 547.

(t) *Gilpatrick v. Sayward*, 5 Me. 465. Where a payment has been made under an oral contract which has fallen through, there is a failure of consideration, and the money may be recovered; *Rice v. Peet*, 15 Johns. 503.

(u) *Knight v. Knight*, 28 Ga. 167; see *Chambers v. Rowe*, 36 Ill. 174.

sider whether the administrator could by his adjudication bind the purchasers to pay the price, they never having signed the notes or the adjudication; the defendant * * * * has substantially admitted the sale in his answer, to say nothing of his acquiescence in the proceedings under the order of seizure.”(v) Where the plaintiff admits the truth of the oral agreement as stated by the defendant, assenting to the addition of a term to the contract as stated and put in suit by himself, specific performance of the defendant will be directed, though, without the plaintiff’s assent, the defendant could not have enforced the added term.(w) An executed oral contract of sale of land is a good defence to an action on the paper title with knowledge of the former.(x)

Where there has been part performance by the vendee, and the vendor claims the purchase-money, this is an affirmance by him, and the contract will be decreed.(y) Where there has been sufficient part performance, a subsequent entire performance will not be disturbed because the contract was an oral one within the Statute of Frauds.(z) The obligees of a contract can recover for breach, though the damages were the prevention by such breach of the fulfillment of another contract which such obligees had with other persons; and this though the latter contract was non-enforceable under the Statute of Frauds, and for other reasons.(a)

Where the defendant by a cheat induced one S., who had orally agreed to sell certain goods to the plaintiff, to sell to him the defendant instead, an action for the deceit lies, though the contract between the plaintiff and S. was within the Statute of Frauds.(b) Where, in furtherance of legislation laying a tax on imported corn in proportion to the amount of British corn sold, an act of Parliament required under a penalty written reports to be made of the amount of corn, it was held that it was the duty of those called upon to report to give all sales including those which were oral, and which, though within the Statute of Frauds, had been fulfilled voluntarily.(c)

(v) *Lafiton v. Doiron*, 12 La. Ann. 165.

(w) *Martin v. Pycroft*, 2 DeG. M. & G. 794; 22 L. J. Ch. 95.

(x) *Lucas v. Mitchell*, 3 A. K. Marsh. 244.

(y) *Robinson v. Davenport*, 40 Tex. 341.

(z) *Bowles v. Wathan*, 54 Mo. 264.

(a) *Waters v. Towers*, 8 Exch. 401.

(b) *Rice v. Manley*, 66 N. Y. 83.

(c) *Rex v. Townrow*, 1 B. & Ad. 477

A verbal direction to the sheriff from the execution-plaintiff to pay the funds of the levy to another execution is good by parol; and having been fulfilled binds the person giving such order.(d)

§ 641. Actual performance, like partial performance, will supplement the defects of a memorandum insufficient under the Statute of Frauds; thus, where the oral contract all but one term was reduced to writing, and that term is actually carried out, the statute does not apply.(e) Where the complainant has assumed certain oral obligations not included in the memorandum, if he is ready to perform, the other party cannot set up the Statute of Frauds.(f) Where only one term as to what rent and interest on certain outlay by the lessor was to be paid by the lessee was left doubtful, and this the payment actually made by the defendant cleared up; and on an engrossed agreement were memoranda by counsel certifying that it was the agreement of the parties, but referring to some details as to a certain interest to be ascertained, and this was ascertained by the actual payments made by the parties, the memoranda were held sufficient.(g)

Insufficient memorandum may be supplemented by parol when there is voluntary performance; and examples of insufficient performance.

Under the Civil Code of Louisiana, the quantity of land passing by a conveyance may be shown by the possession taken thereunder when the conveyance itself does not show; so parol evidence may be given of the boundaries assigned by the plaintiff, the vendor.(h) In a Kentucky case it was said that "this instrument of writing

(d) *Commissioners v. Allen*, 2 Const. (Mill.) Rep. 89. The plaintiff and the defendant were to be entitled by contract to receive a large number of leases from V. R.; it was afterwards verbally agreed that the plaintiff should sell out his interest in the contracts to the defendant and should work for a salary for the defendant, and receive in addition five of the leases; afterwards the plaintiff assigned his interest in the contracts to the defendant and served the defendant for more than the time agreed, and received from the defendant one of the leases; on coming to a settlement it was found that the defendant owed the plaintiff a large sum for the price of the transfer of the plaintiff's interest in the V.

R. contracts and for other things; and the defendant gave his note for the amount found due, not including the four leases, and hypothecated the leases and gave the plaintiff an order on V. R. to transfer the leases to the plaintiff; it was held that the Statute of Frauds was no defence for the defendant, and that, subject to the rights of innocent vendees of these leases, who had no notice, the plaintiff was entitled to his four leases; *Tyler v. Church*, 54 N. Y. 633.

(e) *Brown v. Bellows*, 4 Pick. 189.

(f) *Ives v. Hazzard*, 4 R. I. 27.

(g) *Powell v. Lovegrove*, 8 DeG. M. & G. 363.

(h) *Purl v. Miles*, 9 La. Ann. 270.

does, at least, evidence a contract of mutual exchange of lands *in presenti*, and though it was not enforceable within itself, unaided by extraneous circumstances, for want of certainty in specifying what lands were exchanged, yet, when the parties by their subsequent acts have rendered this uncertainty sure by taking possession and consummating the mutual exchange, it is too late for either party to say there is no memorandum in writing signed by the party to be charged, and especially when the vendor shows he is both able and willing to convey, shall the vendee in possession not be heard to set up such a defence? "(i)

The following is an example of performance regarded as insufficient. The plaintiff had attached in the hands of P.'s executors P.'s debt to Morgan & Co.; the defence was, that it had been agreed between P. and J. M. Morgan, that the latter should buy certain land of P., paying him partly in work, partly in cash, and partly by the discharge of P.'s debt to Morgan & Co.; the contract between P. and J. M. Morgan being oral, and no money being paid, and no possession taken, the Statute of Frauds was held to apply.(j)

§ 642. The doctrine of full or voluntary performance has been applied in a great number of special classes of contract, of which the following are some examples. Thus, a contract in Minnesota for more than seven per cent. interest is void, and will not be disturbed when fulfilled by the parties thereto, the Usury Act being for the protection of the person charged.(k) So the United States must pay for goods actually taken and used by Federal officers, though the contract was not in writing as required by the act of Congress, March 2d, 1861.(l)

Speaking of this act, and saying that it was a Statute of Frauds designed to protect the treasury from fraud, but not to forbid oral contracts as penal or void, the Court of Claims added that "the statute did not forbid the officers of the treasury from recognizing or acting upon the instruments declared void, nor did it declare sale and assignment of claims to be champertous or penal. In a word, it left these assignments and powers of attorney precisely where

The doctrine applied to contracts as to interest; contracts with United States; leases; licenses; flowage; tithes, &c.

(i) *Overstreet v. Rice*, 4 Bush, 4. (l) *Burchiel's Case*, 4 Ct. of Cl. 550;
 (j) *Morgan v. McLaren*, 4 Greene Travers v. United States, 5 Ct. of Cl. 336; see *Neufchatal v. United States*, 17 (La.), 537.
 (k) *Nutting v. McCutchen*, 5 Minn. 388. Ct. of Cl. 386.

the Statute of Frauds left the agreements which it declares void—as instruments which cannot be enforced at law, but which, when voluntarily carried into effect by the defendant's officers, must be deemed by all courts to have expressed and executed the true intent of the parties.”(m)

A lessee is liable for rent after an enjoyment for the full term.(n) Especially when he had given notes for the amount.(o) A contract giving rise to a liability for rent will not be disturbed as to past transactions under it because of the Statute of Frauds.(p) Where a tenant's right has been bought and fully enjoyed, the purchaser is liable for the consideration.(q)

After the enjoyment of an oral lease given in consideration of certain repairs, the tenant is liable for these special repairs, and not merely generally.(r) And so where the tenancy was assigned in consideration of repairs being made.(s) A general oral demise executed as by possession and payment of rent creates a tenancy from year to year.(t)

The execution of an oral license in land may make it irrevocable when no interest in the land passes.(u) Even part performance of an oral contract not to claim damages for flowage in consideration of building a mill, is a good defence to an action for the flowage.(v)

(m) *Buffalo Bayou R. R. v. United States*, 16 Ct. of Cl. 247, citing *Spofford v. Kirk*, 97 U. S. 484, and instancing the rule of voluntary performance under the Statute of Frauds.

(n) *Gibson v. Wilcoxon*, 16 Ind. 333; *Inhabitants of Eastham v. Anderson*, 119 Mass. 531; *Hays v. Goree*, 4 Stew. & Port. 171; *Rogers v. Tracy*, 1 Root, 233; *Voluntine v. Godfrey*, 9 Vt. 189; *Sims v. Porter*, Tapp. 77 (C. P. 5th Circuit, Ohio).

(o) *Gibson v. Wilcoxon*, 16 Ind. 333.

(p) *Pio Pico v. Cuyas*, 47 Cal. 174.

(q) *Dynes v. O'Neill*, 1 Cr. & D. 331; *Griffith v. Young*, 12 East, 514.

(r) *Richardson v. Gifford*, 1 A. & Ell. 52.

(s) *Gray v. Hill, Ry. & Mood*, 420; *Beale v. Sanders*, 5 Scott, 58 (and this though the lease assigned was originally

void, and the obligation to repair was one implied from the terms of such void lease).

(t) *Roe d. Bree v. Lees*, 2 Wm. Bl. 1171; *Christie v. Clarke*, 16 U. C. C. P. 551; *Kerr v. Clark*, 19 Mo. 132; *Strong v. Crosby*, 21 Conn. 392; *Barlow v. Wainwright*, 22 Vt. 92; *McDowell v. Simpson*, 3 Watts, 129.

(u) *Jamieson v. Milleman*, 3 Duer, 261; see *McLarney v. Pettigrew*, 3 E. D. Smith, 111; *O'Donnell v. Breben*, 7 Vroom, 257; *Hollis v. Morris*, 2 Harr. (Del.) 3; *Case v. Weber*, 2 Carter (Ind.), 111.

(v) *Fitch v. Seymour*, 9 Metc. 462; *Seymour v. Carter*, 2 Metc. 520; *Smith v. Goulding*, 6 Cushing, 155; *Clement v. Durgin*, 5 Greenl. 14; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *McCue v. Smith*, 9 Minn. 258.

The consideration stipulated for tithes can be recovered when the latter are actually retained.(w)

§ 643. The rule of voluntary performance applies in the case of trusts, and where land is bought in the name of another, an action will lie for amount realized from the sale of land where, under an oral trust, the defendant bought from the plaintiffs, who had a right to redeem, and resold at a profit; the contract is performed so far as relates to the land.(x) Where the agreement sued upon relates not to a trust in land but to money liability accruing therefrom, the Statute of Frauds does not apply.(y) A voluntary payment for which the recipient gave the due-bill in suit, may be shown to be the fulfillment of an invalid oral trust, so as to establish the defence of a want of consideration.(z)

Where a purchaser, who has orally promised to buy land at the sheriff's sale on behalf of the execution-defendant, buys and resells and takes notes for the price, and places these in the hands of a third person for the benefit of such defendant, the latter may sue for the proceeds of the notes when collected.(a) So where the plaintiff sold land to H. and took the latter's notes, and H. sold to the defendant, who at H.'s direction reserved part of the price to meet the notes, the Statute of Frauds was not a bar in a suit for the amount of the unpaid notes of H.(b) Where the defendant paid the price of land due by the plaintiff and took title as security he must, upon being repaid by the plaintiff, convey to the latter the land.(c)

Where the holder of a title bond agreed with the defendant that the latter should take title, and the defendant carried out this contract by paying additional consideration, and conveyed half the land to the plaintiff; the latter cannot disturb the former in his half.(d) Where H., the plaintiff's assignor, in the defendant's absence, partly with his own money but principally with the defendant's, completed a verbal purchase of land made by the defendant and took the deed in the latter's name, and the defendant subsequently

(w) *Eaton v. Sherwin*, Skin. 113.

(x) *Tinkler v. Swaynie*, 71 Ind. 567; see *Brown v. Lunt*, 37 Me. 434.

(y) *Lewis v. Gray*, 1 Mass. 304.

(z) *Eaton v. Eaton*, 35 N. J. Law, 292.

(a) *Garrett v. Garrett*, 27 Ala. 691.

(b) *Dearborn v. Parks*, 5 Greenl. 81.

(c) *Cousins v. Wall*, 3 Jones, Eq. 45; see *Gilpatrick v. Sayward*, 5 Me. 465.

(d) *Shields v. Trammell*, 19 Ark. 51;

see *Bates v. Terrell*, 7 Ala. 129. See also *Eaton v. Whitaker*, 16 Conn. 231.

ratifies the act of the plaintiff's assignor, he is liable to the plaintiff for what the latter assignor paid on his the defendant's account.(e)

Letcher sued Cosby and Burriss; Cosby owned the land and gave title bond for it to Letcher, but being informed by Letcher that he had sold to Burriss; at Letcher's desire he, Cosby, gave deed to Burriss. Burriss was put into possession of the land. It was held that the contract was fully executed.(f) Where the plaintiff, having had an oral agreement with J. E. for the sale of a house from the latter, sold his bargain for £40 to the defendant, and J. E. conveyed under the direction of the defendant to a third person, it seems that the contract is executed, and the £40 may be recovered.(g) Where by a parol agreement it is stipulated that instead of conveying at the time and to the person named in written contract of sale of land, the land shall be conveyed at another time and to another person; and it is so conveyed; the vendor can recover the purchase-money under the original writing, as the Statute of Frauds does not apply to the executed parol agreement.(h)

A purchase of land at a low price, under an oral promise to apply the proceeds in a certain way, is taken out of the Statute of Frauds by taking a conveyance and reselling.(i) Where B. agrees by parol to convey to the plaintiff and conveys to the defendant in trust for the plaintiff, the contract is performed and taken out of the Statute of Frauds as much as if B. had conveyed to the plaintiff and he had conveyed to the defendant; the latter cannot set up the statute.(j) On the other hand, proof of an oral declaration by

(e) *Elliott v. Armstrong*, 2 Blackf. 198.

(f) *Letcher v. Cosby*, 2 A. K. Marsh. 107.

J. F. J., the owner of certain property, sold it to Dellinger the defendant, and entered into a bond with the latter by which J. F. J. bound himself to make title, and Dellinger to pay the purchase-money; while this bond was not yet due, J. F. J. conveyed the land to the plaintiff, who knew of the outstanding title bond; when the bond was due Dellinger was not able to pay, and assigned the bond orally to J. M. S., who devised the land to Smith, the other defendant, who paid the bond and took

a deed of the land from J. F. J. It was held that while the agreement between Smith and Dellinger being within the Statute of Frauds was therefore not enforced so long as executory, yet that J. F. J. having conveyed the land to Smith without requiring an assignment in writing of the title bond from Dellinger to Smith, it was held that the title of the latter was valid; *Derr v. Dellinger and Smith*, 75 N. Car. 300.

(g) *Price v. Seaman*, 4 B. & C. 527.

(h) *Moore v. McAllister*, 34 Miss. 504.

(i) *White v. Crew*, 16 Ga. 416.

(j) *Sweet v. Mitchell*, 15 Wis. 665.

the defendant's testator that he had sold certain land, and that the plaintiff's intestate had an interest in the proceeds, will not support an action for money had and received.^(k)

Where a father-in-law authorized his son-in-law to sell land of the former at a certain price, and afterwards the former conveyed to the latter, it was held that the money received by the latter was in the nature of an advancement, but that the oral contract under which the son-in-law sold being executed, he would be charged as having received an advancement only of the money actually received by him for the land and not with the later value of the land.^(l)

§ 644. Contracts by which the profits of a sale of land are to be jointly shared are not within the Statute of Frauds where the sale has been made and the profits realized. Thus a contract that the defendant, a mortgagee having a decree of foreclosure against the land, bargained with the plaintiff, the owner, for the direct conveyance thereof, and agreed to pay him therefor \$50, and such further sum as the plaintiff could within one year find a purchaser willing to give for the land, and the excess of that sum, over the amount due the defendant on his decree, he would pay over to the plaintiff; and this though the defendant had not been bound to convey to the purchaser found by the plaintiff.^(m) Where the plaintiff had conveyed land to the defendant for sale and subject to an account for the profits, an action will lie for the latter;⁽ⁿ⁾ so where the plaintiff had been debtor to the defendant, who received the land in payment subject to an account for the surplus.^(o)

The Statute of Frauds is no bar to a suit for profits of sale of

(k) *White v. Coomba*, 27 Md. 500.

(l) *Barber v. Taylor*, 9 Dana, 89.

(m) *Reyman v. Mosher*, 71 Ind. 599.

So where the defendant Child bought at sheriff's sale the interest of one H., the execution debtor whose property was being sold; this interest was subject to a mortgage, and Child, being unable to make the necessary payment, assigned the certificate to Fraser, the plaintiff, who advanced him the money, and it was agreed that Fraser should get the mortgage and take such proceedings as would

make the title clear; in doing so by a sale a surplus was obtained over the mortgage, but which was not enough to pay Fraser's advances to Child; it was held that Fraser might recover the difference from Child under the parol agreement, and the Statute of Frauds was not a bar, as this was merely a suit to recover money loaned; *Fraser v. Child*, 4 E. D. Smith, 159.

(n) *Linscott v. McIntire*, 15 Me. 201.

(o) *Massey v. Holland*, 3 Ired. 196.

land bought in partnership.(p) Where the defendant promised to sell land and share proceeds with the plaintiff, suit will lie after sale made.(q) Where the vendee takes the conveyance of the land under an agreement to resell and share profits, he is liable for the latter when he sold.(r)

Where there was a contract to sell lands with a joint interest in the profits, the plaintiff to render all the active services, the defendant to pay the money and take title, the statute is no bar to an action for a share of the profits.(s) Where the plaintiff furnished trees to be planted in the defendant's ground, and the profits from the fruit to be divided, it was held that the contract was fully performed as to the Statute of Frauds by the planting of the trees, the plaintiff having no interest in the land, but only a right to a share of the fruit.(t) To an action for their share of the price brought by two joint owners of a chattel against a third who had sold it, the Statute of Frauds is no defence.(u)

§ 645. The execution of a will is a full performance of a contract to devise, and the Statute of Frauds is satisfied, and the obligee can recover though the obligor afterwards revokes his will.(v) One liable under an oral guaranty can fulfill and recover the amount from the party answered for.(w) In such a case the court said: "It was a promise which bound the respondent in point of honor, and having been made at the request of Munson and in his presence, there was an implied contract on his part that if the respondent paid the money he would repay it. The payment made by the respondent must, therefore, be taken to have been made by Munson's authority, and

Devise;
guaranty;
promissory
note.

(p) *Bruce v. Hastings*, 41 Vt. 380;
see *Pio Pico v. Cuyas*, 47 Cal. 174.

(q) *Trowbridge v. Wetherbee*, 11 Allen, 364.

(r) *Linscott v. McIntire*, 15 Me. 203;
Miller v. Kendig, 7 Nor. West. Report. 501; 55 Iowa, 174.

(s) *Bunuel v. Taintor*, 4 Conn. 568;
see *Bissell v. Harrington*, 8 N. Y. Week. Dig. 400; 18 Hun, 83; *Sedam v. Shaffer*, 5 W. & S. 533; *Harber v. Congdon*, 1 Coldw. 221, as examples of the recovery of profits of land sold under an oral contract giving a joint interest.

(t) *Robbins v. McKnight*, 1 Halst. Ch. 644.

(u) *Dodge v. Clyde*, 7 Roberts. 411;
see *Reeves v. Goff*, Penning. 454.

(v) *Lowe v. Bryant*, 30 Ga. 532;
Sutton v. Hayden, 62 Mo. 112; (*semble*)
citing *Brinker v. Brinker*, 7 Pa. St. 55,
and other cases.

(w) *Alexander v. Vane*, 1 M. & W. 513 (the guaranty was given in the presence and with the assent of the defendant); see *Simpson v. Penton*, 2 Cr. & M. 433; 4 Tyr. 317.

having been so made, the respondent might have recovered the amount in an action against Munson for money paid, laid out, and expended for him and at his request.”(x)

So where one under a contract fulfills an oral guaranty, he can recover the consideration of the contract.(y) And even where the person answered for directs the guarantor not to pay, the latter can pay and recover from the former.(z) So where a vendee as part of the price of the land agrees to pay a debt of the vendor, he can do so and credit it on the price, in spite of the vendor’s prohibition.(a)

One performing an oral guaranty is entitled to the benefits of the contract under which he does so, even as against third persons.(b) As, for example, against an indemnitor at whose instance the verbal guaranty was given.(c) So payments may be applied to an invalid guaranty, though the effect of this may be injurious to the claims of other creditors.(d) Where a commission merchant orally guarantees the proceeds of sales made by him, and fulfills the promise, he can recover a commission stipulated for so doing.(e) A surety in an oral contract may give a binding memorandum of his promise.(f)

Where a person liable on a note becomes aware of a certain fraud which would have enabled him to avoid paying the note, but orally promises to nevertheless pay it, if given time, his promise is not a guaranty within the Statute of Frauds.(g) Where Craig, the plaintiff’s brother, had been the principal debtor, and one R. P. the surety under the contract, and suit on the latter was brought against Van Pelt, R. P.’s executor, and Craig promised Van Pelt to pay the debt and did become surety on a replevin bond in a replevin taken by Van Pelt; it was held that Craig, being made to pay under the bond, could not recover as against Van Pelt.(h)

(x) *Simpson v. Hall*, 47 Conn. 425.

(y) *Watrous v. Chalker*, 7 Conn. 224.

(z) *Beal v. Brown*, 13 Allen, 114.

(a) *Brashear v. Moran*, 1 Ken. Law Rep. 417 (S. C. Ky.)

(b) *Tibbetts v. Flanders*, 18 N. H. 289.

(c) *Cresswell v. Wood*, 10 A. & Ell. 462 (a branch of the *Green v. Cresswell* dispute); *Godden v. Pierson*, 42 Ala. 374; *Green v. Brookins*, 23 Mich. 52.

(d) *Murphy v. Webber*, 61 Me. 479;

Mueller v. Wiebracht, 47 Mo. 470; *Robbins v. Lincoln*, 12 Wis. 6.

(e) *Rowland v. Bull*, 5 B. Mon. 149.

(f) *Cady v. Allen*, 22 Barb. 394.

(g) *Rindskopf v. Dornan*, 28 Ohio St. 520.

(h) *Craig v. Van Pelt*, 3 J. J. Marsh. 491. Where the principal debtor W. agreed with his creditor, the Pearl Street Society, to give them a mortgage to secure their claim inasmuch as Imlay the

Where the principal debtor on a note informed the defendant, who was payee and first endorser, and the plaintiff, who was second endorser, that he was insolvent, and agreed to make an assignment of his property and to prefer the note, and the plaintiff and defendant agreed with him to pay the note and look to the assigned estate to reimburse them; it was held that the defendant was no longer liable to pay the whole debt represented by the note as being first endorser, but that under the new contract each was liable for one-half, and that the plaintiff paying the whole debt could only recover one-half.⁽ⁱ⁾ An oral promise by the defendant, to whom the plaintiff has lent a certain sum in State securities, that he would pay these securities, is executed by the plaintiff in lending the securities, and the Statute of Frauds does not apply.^(j)

Where the plaintiff has paid, at the defendant's request, the latter's debt to a third person, it is not material that the defendant was perhaps not so indebted.^(k) A written guaranty will, whether it expresses the consideration sufficiently or not, relieve the sheriff, if the landlord accept such guaranty and permit the sheriff to proceed without reserving the rent from the proceeds of sale.^(l) The liability of one giving a promissory note under a contract within the Statute of Frauds is generally upheld on the ground that the contract has been fully executed.^(m)

Where a vendee of land agreed to pay by a note to be endorsed by three persons, and two of the latter actually do so, and the vendee promises that the plaintiff shall also endorse, and the latter afterwards endorsing and being compelled to pay, cannot recover the amount from the payee of the note, the vendor of the land, as

defendant, his surety, had become insolvent, and did so give them a mortgage on his property, on condition that if he found other security the society would release the mortgage that W. might raise a new loan on the land to pay off a lien on it. The society afterwards released the mortgage. It was held that though the contract between the society the plaintiffs and W. was in parol, it was admissible notwithstanding the Statute of Frauds to explain the conduct of the society in releasing the mortgage; and that the contract was

moreover executed; their claim, therefore, against the defendant as surety of W. was not affected by the subsequent transaction as to the mortgage between plaintiffs and W.; *Pearl St. Soc. v. Im-lay*, 23 Conn. 17.

(i) *Westfall v. Parsons*, 16 Barb. 648.

(j) *Pinney v. Pinney*, 2 Root, 191 (a case briefly and not clearly reported).

(k) *Perkins v. Littlefield*, 87 Mass. 370.

(l) *Rothery v. Wood*, 3 Camp. 24.

(m) *Weightman v. Caldwell*, 4 Wheat. 85.

having been a voluntary payment.(n) It may be a question for the jury whether there has been such performance.(o) A contract to repay purchase-money paid if the title to land fails is good by parol, though the payment was by a promissory note.(p) An acceptance of a house and barn (it seems, with a view of severance) in extinguishment of a note is good if actually accepted.(q)

It is a good defence to a suit on a note to show that the defendant agreed by parol to convey land to a third person in consideration of the extinguishment of the note and of a sum paid by the plaintiff, that possession of the land had been delivered by the defendant to the third person, who has committed waste thereon.(r) Where the vendor is willing to carry out a sale of land, the vendee is liable on notes given for the price.(s)

§ 646. Delivery of goods is full performance of an oral contract relating thereto.(t) The North Carolina Statute of Chattels; labor; marriage. Frauds applying to "all contracts to sell or convey land or slaves," does not apply to a slave actually delivered; the court said the dangers of perjury were as great in the case of executed as executory contracts, but that the former were not within the language of the statute.(u) Under a statute of New Hampshire forbidding the mortgagor of chattels from selling them without the written assent of the mortgagee, and providing a penalty, it was held that where a sale has been actually executed by payment and delivery, parol evidence of the mortgagee's assent is admissible on behalf of the purchaser.(v)

An oral gift of chattels when delivered is valid.(w) Where a

(n) *Berryhill v. Jones*, 35 Ia. 339.

(o) *Id.*

(p) *Thayer v. Viles*, 23 Vt. 497.

(q) *Thayer v. McEwen*, 4 Bradw. 419.

(r) *Melton v. Coffelt*, 59 Ind. 314.

(s) *Rhodes v. Storr*, 7 Ala. 346.

(t) *Purner v. Piercy*, 40 Md. 321; *Gray v. Payne*, 16 Barb. 277; *Sawyer v. Ware*, 36 Ala. 651; *Stone v. Denison*, 13 Pick. 4.

(u) *Choat v. Wright*, 2 Dev. Law, 289.

(v) *Gage v. Whittier*, 17 N. H. 317, citing cases. The plaintiff and defendant verbally agreed to give a third person certain bonds for certain stock,

the plaintiff and defendant verbally agree that the defendant shall carry out the transaction by himself and settle with plaintiff afterwards; the defendant supplies all the bonds himself and gets all the stock; it was held that the plaintiff, upon furnishing the defendant his quota of the bonds, was entitled to his share of the stock; the contract having been originally within the Statute of Frauds but taken out of it by part performance, and the defendant was regarded as plaintiff's agent; *Tomlinson v. Miller*, 7 Abb. Pr. N. S. 368.

(w) *Bowie v. Bowie*, 1 Md. 94.

seller of chattels agrees with one who has orally bought from the purchaser, to take care of them, he cannot raise the point that the later sale was oral.(x) An oral contract relating to a growing crop is fully performed when it is gathered and sold, and the proceeds received by the defendant.(y) Where a contract for work and labor is fully performed, the Statute of Frauds does not apply.(z)

An agreement to pay a broker for the sale of land a compensation measured by the price obtained, is not within the Statute of Frauds when the sale has been made and a conveyance had thereunder, and a part payment by the defendant to the plaintiff.(a) A widow is not entitled to dower in lands which the husband had before marriage orally contracted to sell, and which after marriage he conveyed in accordance with his contract.(b) An oral antenuptial agreement that the wife's personal property should remain to her separate use is valid, so far as to make the property the wife's after the husband's death, though he had taken it into possession and put it out at security in her name.(c)

A parol contract under which, in consideration of being given a new house, a wife relinquishes her dower in another, and which is executed by husband and wife living in the new house; the wife, after her husband's death, is not liable for rent for the time during which she occupied the new house between her husband's death and the allotment of her dower, the Statute of Frauds not preventing the parol contract being proved, inasmuch as it was executed.(d)

§ 647. A creditor receiving payment from his debtor without any direction as to its application, may apply it to a debt upon which no action can be maintained under the Statute of Frauds.(e) Where a guarantor has orally promised to

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| (x) <i>Brown v. Hall</i> , 5 Lans. 179. | (b) <i>Gaines v. Gaines</i> , 9 B. Mon. 298, |
| (y) <i>Hollis v. Morris</i> , 2 Harr. (Del.) 3. | citing cases; see § 650, n. (k). |
| (z) <i>Stone v. Dennison</i> , 13 Pick. 6. | (c) <i>Flowers v. Kent</i> , Brayt. (Vt.) 238. |
| (a) <i>Fiero v. Fiero</i> , 52 Barb. 288; see | (d) <i>Slatter v. Meek</i> , 35 Ala. 542. |
| <i>Rowland v. Bull</i> , 5 B. Mon. 149, holding that a commission merchant verbally guaranteeing the proceeds of sale may fulfill the guaranty and recover a commission agreed to be given for making the guaranty. | (e) <i>Townsend v. Hargraves</i> , 118 Mass. 332, citing <i>Haynes v. Nice</i> , 100 Mass. 327. See generally, Mung. on Appl. of Pay. 38. |

answer for certain debts of a third person, and, by a writing complying with the Statute of Frauds, for certain future debts, a general payment may be applied by the creditor to the earlier items invalid under the statute.(f)

The plaintiff Jones sued for two mules which he had mortgaged to Townsend the defendant, together with certain cotton, for a debt of \$500; he owed Townsend \$500 besides. D. proposed that the mortgage should be confined to the cotton; that he, D., should give Townsend his note for the unsecured \$500, and take from Jones a mortgage of the two mules, and that he, D., and Jones should rent land from Townsend; and at the time of this agreement Jones paid \$500; it was held that the arrangement with D. was within the Statute of Frauds, but that Jones might apply his \$500 in payment of the secured debt, and, if so, was entitled to have back the mortgaged chattels, the mules.(g) The parties to a contract may so apply a payment, and no third person can complain.(h)

§ 648. It is a question as to when the title to land under an oral contract subsequently carried out actually vests. When title to land vests in case of voluntary performance. A mortgage made of his leasehold by a lessee between the time of the parol contract of leasing, and its execution by a lease given, is validated by such subsequent executed lease.(i) It has been held that where a sale, invalid under the Statute of Frauds, is made and afterwards a deed is regularly given, an intermediate sale by the vendee binds him.(j) A conveyance under an earlier oral sale of land will cut out the interest under an intermediate written one.(k) A vendee of land takes it clear of a judgment against the vendor entered after the making of the oral contract, and the giving of the actual conveyance; it being admitted that in equity the vendor would have been compelled to perform.(l)

(f) *Murphy v. Webber*, 61 Me. 479; see *Robbins v. Lincoln*, 12 Wis. 6; *Mueller v. Wiebracht*, 47 Mo. 470.

(g) *Townsend v. Jones*, 47 Ala. 481.

(h) *Beaman v. Buck*, 9 Sm. & M. 210.

(i) *Johnson v. Stagg*, 2 Johns. 520.

(j) *Jackson d. Crabb v. Bull*, 2 Cai. Ca. in Err. 301.

(k) *Clark v. Rucker*, 7 B. Mon. 585.

(l) *Minns v. Morse*, 15 Ohio, 571.

Where the complainant bought land under an agreement with his sister, who was then unmarried, that the purchase should be for their joint benefit; the complainant took title in his own name, and the defendant paid \$300 to bind the bargain. A deed for her interest was not made to the defendant until February 10th, 1871; from then to 1874 both parties contributed to the expenses of the

Trespass will lie on behalf of a vendee by parol who after the trespass gets a deed for the land.^(m) In a later Indiana case the rule is said to be that the legal title of the vendee under the oral contract must be completed by at least a sufficient memorandum under the Statute of Frauds, if it is to revert and cut out intermediate claims. Thus, where the owners made a verbal sale to T., under whom the plaintiff claims, and then the owner sold to the defendant if not already sold by the agent; then the owner gave a title bond to T. and afterwards a deed of the land to the defendant, who took with notice of the title bond to T. The court said: "It is contended that a parol contract for the sale of land or for a lease for a longer term than three years is not void, but valid for many purposes, and a conveyance in compliance with such contract will relate back to its date, and overreach an intermediate valid sale; that a vendor may, by pleading the Statute of Frauds, avoid a parol contract for the sale of land, or he may waive it and consummate the contract, and cannot be deprived of his right to do so by a stranger. But we think the true rule is that the vendor makes his election to treat the prior verbal contract as void, whenever he makes a valid agreement of sale in the face of it, and that the intermediate purchaser, in such case, is shielded by the statute as well as the vendor."⁽ⁿ⁾ The court decided, however, that while the vendor might, as has been just said, disregard the verbal contract, yet in this case the vendor had chosen to affirm the oral contract; and the plaintiff, the assignee of T., had judgment.

land as they were incurred, and in 1874 the land was actually divided; the bill in equity was brought for an account and for the recovery of moneys expended by the plaintiff for the defendant at her request. It was held, that the fact of the original purchase having been made under an oral contract within the Statute of Frauds, did not preclude the complainant from having a recovery so far as regarded expenses, &c., connected with the land, which were incurred between the purchase in 1868 and the taking of a deed by the defendant on February 10th, 1871; the recovery for matters since that date not being dis-

puted; *Eichart v. Grayson*, 6 W. N. Cas. 298; (C. P. No. 4, Philadelphia).

(m) *Carney v. Reed*, 11 Ind. 418.

(n) *Hunter v. Bales*, 24 Ind. 302, saying that for the rule as contended for by counsel the following cases were cited: *Gudgell v. Duvall*, 4 J. J. Marsh. 230; *Lucas v. Mitchell*, 3 A. K. Marsh. 244; *Minns v. Morse*, 15 Ohio, 568; *Dawson v. Ellis*, 1 Jac. & Walk. Ch. 503; the court said that the Kentucky cases went on the moral obligation of a promisor, and it denied the existence of such an obligation; it also distinguished *Dawson v. Ellis* and *Jackson d. Crabb v. Bull*, *supra*. See *Jacob v. Smith*, 5 J. J.

In an Irish decision which held that a post-nuptial settlement would not be supported as against creditors by an ante-nuptial oral promise, the court contrasted the first and fourth sections of the Irish Statute of Frauds (7 Wm. III. c. 12), to show that under the first section no title passes until deed or writing executed; whereas, under the fourth (that relating to trusts), the declaration of trust may be subsequently made, and the trust go into effect at the date of the earlier oral promise.(o)

Where in April, 1864, L. orally sells land to B.; on October 7th P. gets a judgment against B.; on October 21st L. conveys to B. and takes a bond for the price, and afterwards L. gets a judgment on his bond; it was held that B., under the oral contract, had an estate at will, and that L., by waiving the Statute of Frauds and conveying to B., gave the latter a title which reverted to the date of the oral contract and was bound by the judgment of P., which was entered between the time of the oral contract and that of the conveyance; it should be said that a judgment in Pennsylvania, in which the suit arose, does not bind after-acquired land.(p)

Where a vendee was under a parol contract with his vendor as to the manner of paying the purchase-money, and by writing assigned his interest, reciting the oral contract; it was held that though, it seems, the assignee could not enforce the contract as against the original vendor, the vendee had yet passed all his right, and there was nothing in the land which would be bound by an execution against him.(q)

§ 649. The parties to an oral contract within the Statute of Frauds have the right to perform if they wish to do

The parties
to an oral

so.(r) The Statute of Frauds, as has been often said,

Marsh. 382; *Mitchell v. King*, 77 Ill. 466.

(o) *L'Estrange v. Robinson*, 1 Hogan, 202; see as to when the oral contract, subsequently reduced to writing goes into effect, on *Townshend v. Norwich*, II. Brighton, H. & W. 113, &c.

(p) *Lloyd's Appeal*, 82 Pa. St. 488, citing cases.

(q) *Garr v. Hill*, 1 Stockt. 214.

(r) *Beatson v. Nicholson*, 6 Jur. 620; *Baker v. Hollobaugh*, 15 Ark. 327; *Osborne v. Endicott*, 6 Cal. 149; *Burt*

v. Wilson, 28 Cal. 632; *Hollinshead v. McKensie*, 8 Ga. 457; *Kirksey v. Kirksey*, 30 Ga. 156; *Kinsie v. Penrose*, 2 Scam. 520; *Thornton v. (Vaughan) Heirs of Henry*, 2 Scamm. 218; *Dyer v. Martin*, 4 Scamm. 148; *Tarleton v. Vietes*, 1 Gilm. 470; *Switzer v. Skiles*, 3 Gilm. 529; *Robbins v. Butler*, 24 Ill. 387; *Lear v. Chouteau*, 23 Ill. 39; *Chicago &c. Coal Co. v. Liddell*, 69 Ill. 640; *Babineau v. Cormier*, 1 Martin, N. S. 459; *Packwood v. White*, 7 La. 34 (citing *Lockett v. Toby*, 10

is a shield, not a sword.^(s) Under the Code of Kentucky it has been said that no judgment can be given upon a contract within the Statute of Frauds, though no defence is made.^(t) In a suit they can expressly acknowledge the contract, or simply refrain from setting up the defence of the contract.^(u) A chancellor will not rescind an oral contract relating to land if the parties choose to perform it.^(v)

contract may voluntarily perform it; Statute of Frauds a shield not a sword; the oral contract not invalid.

Equity will not help to violate a contract, even one within the Statute of Frauds.^(w) An oral contract within the Statute of Frauds furnishes a moral obligation, and the parties have a right to carry it out.^(x) Speaking of a point arising under the Statute of Limitations, the court said that the latter did not begin to run until there was a right to sue for breach of the contract, which was an oral one within the Statute of Frauds; and added: "The parties had a right to rely upon each other to perform the agreement until some act was done terminating its existence. Courts will enforce such contracts unless the Statute of Frauds is interposed as a defence. All courts, to render the statute availing, require that it must be set up in some mode, and relied upon as a defence; hence, it is reasonable to say the contract is not abso-

La. Ann. 715, an earlier case, but reported after *Packwood v. White*, 7 id. 33; *Pauline v. Hubert*, 14 La. Ann. 162; *Haughery v. Lee*, 17 La. Ann. 2; *Stearns v. Hubbard*, 8 Greenlf. 320; *Albert v. Winn*, 5 Md. 74; *Artz v. Grove*, 21 Md. 456; *Small v. Owings*, 1 Md. Ch. Dec. 363; *Winn v. Albert*, 2 Md. Ch. Dec. 169; *Norton v. Simonds*, 124 Mass. 19; *Fox v. Matthews*, 33 Miss. 444; *McGowen v. West*, 7 Mo. 569; *Farrar v. Patton*, 20 Mo. 84; *Hoffman v. Ackley*, 34 Mo. 277; *Cresswell v. McCaig*, 11 Neb. 227; *Newton v. Swazey*, 8 N. H. 13; *Ashmore v. Evans*, 3 Stockt. 151; *Dean v. Dean*, 1 Stockt. 425; *Van Dyne v. Vreeland*, 1 Beasley, 142; *Jervis v. Smith*, Hoff. Ch. 470; *Champlin v. Parish*, 11 Paige, Ch. 405; *Cozine v. Graham*, 2 Paige, Ch. 177; *Harris v. Knickerbacker*, 5 Wend. 638; *Woods v.*

Dille, 11 Ohio, 455; *Sneed v. Bradley*, 4 Sneed, 301; *Garner v. Stubblefield*, 5 Tex. 560; *League v. Davis*, 53 Tex. 14; *Montgomery v. Edwards*, 46 Vt. 153; *Argenbright v. Campbell*, 3 Hen. & Mun. 161; *Rarey v. Cornell*, 2 West. L. M. 415 (Wis.)

^(s) *Jervis v. Berridge*, 42 L. J. Ch. 518; L. R. 8 Ch. App. 356; *Kilburn v. Forrester*, Drap. (U. C.) 346; *Gulley v. Macy*, 84 N. Car. 441; *Craig v. Van Pelt*, 3 J. J. Marsh. 491.

^(t) *Hocker v. Gentry*, 3 Metc. (Ky.) 474.

^(u) *Hopkins v. Lacouture*, 4 La. 65.
^(v) *Nelson v. Forgey*, 4 J. J. Marsh. 571.

^(w) *Rhine v. Robinson*, 27 Pa. St. 34.

^(z) *Brown v. Rawlings*, 72 Ind. 510; *McCoy v. Williams*, 6 Ill. 587.

lutely void, as are contracts that are prohibited to be made by the statute, as where they are immoral or contravene sound policy. But such a contract is voidable at the will of either party, unless so far executed as to take it out of the operation of the statute. It then follows that the Statute of Limitations did not begin to run until one party or the other brought it to an end.”(y)

A contract of purchase, invalid under the Statute of Frauds, will give an insurable interest.(z) The interest of a party to an invalid oral contract within the Statute of Frauds is sufficient to make him an incompetent witness.(a) In a Florida case it was thought that an oral guaranty would not give rise to any interest which will on that account disqualify a witness.(b)

Where no objection is made, title to land may be shown orally in a suit before a justice of the peace for the unlawful detention of the land.(c) Where the plaintiff sued on a due-bill the defendant was allowed to show that it was without a consideration, the payment evidenced by it being the voluntary performance of a trust; and this though the latter was within the Statute of Frauds.(d)

In Louisiana it has been suggested that oral evidence was not admissible, though not objected to, to show that the owner of real estate agreed that it should be sold as the property of a third person.(e) Where the defendant bought the interest of two persons in certain land, he could not object that the interest of one of them, consisting of a claim against the other, was in the fulfillment of an oral contract within the Statute of Frauds.(f)

§ 650. The question of when the title vests under an oral contract subsequently reduced to writing, has already been considered. Another feature of the same is the point whether a vendor can fulfill an earlier oral contract as against a later written one. In a case at the Rolls Sir Thomas Plumer suggested that “where a vendor fulfills a parol contract of sale of land by conveying to the vendee, the latter is not obliged to convey to one to whom vendor gave

(y) *Collins v. Thayer*, 74 Ill. 142; see to the same effect, *Udike v. Ten Broeck*, 3 Vr. 116.

(z) *Amsinck v. Amer. Ins. Co.*, 129 Mass. 186.

(a) *Robbins v. Butler*, 24 Ill. 387.

(b) *Williams v. McGehee*, 2 Flor. 67.

(c) *Compton v. Ivey*, 59 Ind. 353.

(d) *Eaton v. Eaton*, 35 N. J. Law,

292.

(e) *Logan v. Herbert*, 30 La. Ann. 730.

(f) *Burke v. Wilber*, 42 Mich. 327.

a written promise to convey after the parol contract, but before the conveyance thereunder.”(g) Where the owner of land makes sale subject to a condition that his agent has not before sold, and the agent had sold by parol, the principal can adopt such earlier oral contract and refuse to perform the later.(h)

Where B., the agent of Brucker, one defendant, sold land to King, a co-defendant, and the plaintiff induced Brucker to sell to him, not telling him of the sale to King; it was held that Brucker was at liberty to fulfill the oral contract with King, and that Mitchell’s fraud in concealing the previous sale to King was a bar to his having specific performance.(i) And where a vendor verbally sells land to one and afterwards by writing to another, without notice, and who makes a part payment, and afterwards the vendor conveys to the first vendee, the second vendee cannot have specific performance, but is left to his remedy at law.(j)

While it is admitted that the general rule of law gives dower to a widow whose husband after marriage conveys land which before marriage he had orally sold, yet in a Wisconsin case it was held that in that State, in absence of part performance before the marriage, the oral contract, though afterwards fulfilled, would not cut out dower.(k) The vendor can fulfill the later contract if he chooses, and the knowledge by the later vendee of the prior oral contract will not affect the matter.(l)

§ 651. No third person can set up the Statute of Frauds, for *non constat* that the parties will not voluntarily perform.(m) Only the party to be charged can set up the

Third parties cannot

(g) Dawson v. Ellis, 1 Jac. & Walk. 505; see McMillan v. Bentley, 16 Grant, Ch. 387.

(h) Jacob v. Smith, 5 J. J. Marsh. 382.

(i) Mitchell v. King, 77 Ill. 466. Where a vendor addressed a letter to his agent saying, “Mr. Spangler” (the plaintiff) “called on me, &c., and agreed to take pasture lot for \$2400” (giving time of payment and manner of securing it); “make papers,” &c.; “Rec’d \$20 on above contract;” and signed this; it is a sufficient memorandum, though the agent had earlier that day made a verbal sale to another; the vendor, the de-

fendant, handed the memorandum to the plaintiff, who took it to the agent; Spangler v. Danforth, 65 Ill. 153.

(j) Patterson v. Martz, 8 Watts, 379.

(k) Madigan v. Walsh, 22 Wis. 505; see § 647, n. (b).

(l) Young v. Blaisdell, 60 Me. 272; see also Steele v. First National Bank, 60 Ill. 26.

(m) Lavender v. Hall, 60 Ala. 214; Cunningham v. Patton, 6 Pa. St. 357; McConnell v. Brillhart, 17 Ill. 362; Chicago Dock Co. v. Kinzie, 49 Ill. 289; Bohannon v. Pace, 6 Dana, 194; Sneed v. Bradley, 4 Sneed, 301; Ryan v. Tom-

set up the Statute of Frauds; general ex-
 amples. statute.(n) It has been held, however, in South Carolina that the public escheator can avail himself of the Statute of Frauds to show that an oral sale of land made by him whose property is sought to be escheated was ineffectual to divest the latter's title.(o) The defence of the statute is a personal one; no one is obliged to set it up for the benefit of a third person.(p)

Speaking of the Statute of Frauds, the Supreme Court of Illinois said: "This statutory defence is personal, and cannot be interposed by strangers to the agreement. Like usury, infancy, and a variety of other defences, it can only be relied on by parties and privies."(q) It has been said that the Statute of Frauds is not especially to protect creditors, but to protect one party against the fraud of the other.(r)

The following are a number of examples of the rule which refuses to third persons the benefit of the Statute of Frauds. Thus, where it was doubtful whether the land in controversy was part of that for which one of the defendants had given a title bond to M., who had agreed with the plaintiff to take the land on shares, the court ordered that M. be made a defendant, for it would not be assumed beforehand that he would plead as against the plaintiff the Statute of Frauds.(s)

In an Iowa case, Judge Dillon, dissenting on some points from the majority of the court, said: "That under no circumstances could the plaintiff, who claimed from the same donor as the defendants, set up as against the latter the Statute of Frauds, Wilde the donor being the only person to object that the defendants' license was parol."(t) A bequest of leaseholds was held to be

linson, 39 Cal. 644; Babineau v. Cormier, 1 Martin, N. S. 459; Cowan v. Adams, 10 Me. 382; Rickards v. Cunningham, 10 Neb. 420; League v. Davis, 53 Tex. 14; Norton v. Simonds, 124 Mass. 19; Waters v. Towers, 8 Exch. 401. see Rickards v. Cunningham, 10 Neb. 420, citing Cahill v. Bigelow, 18 Pick. 369; Robison v. Uhl, 6 Neb. 328; Uhl v. Robison, 8 id. 272; Eisely v. Malchow, 9 id. 174; McCormick v. Drummett, Id. 384.

(n) Bohannon v. Pace, 6 Dana, 194.

(o) Sebben v. Trevezant, 3 Desaus.

217.

(p) Rust v. Morse, 2 Hill, 657.

(q) Chicago Dock Co. v. Kinzie, 49 Ill. 289; McCoy v. Williams, 6 Ill. 589;

(r) Snyder v. Martin, 17 W. Va. 302.

(s) Brown v. East, 5 T. B. Mon. 408.

(t) Anderson v. Simpson, 21 Ia. 404.

The following Kentucky decision will show how the rule of voluntary performance was used to settle the rights which arose from a most involved state of

adeemed by a testator who completed a parol contract with a railway for the land ; and this notwithstanding the Statute of Frauds. The legatee was further allowed the rents till the railway completed the purchase ; the right to the rents having been reserved by the testator in the parol contract.(u)

Where the plaintiff leased land to one C. for a rent payable in cotton, on which if the lease were valid the plaintiff as landlord would have a lien, the defendant who gets possession of and converts the cotton cannot set up the Statute of Frauds, the contract having been executed.(v) Where a vendee under an oral sale having taken possession of land and having paid nothing surrenders possession to his vendor, the latter only is liable for mesne profits to the holder of a paramount title.(w)

Where the plaintiff had the use of land during the lives of his donors upon condition of supporting them, he can replevy grain levied on by their execution creditor, though his, the plaintiff's, contract was an oral one within the Statute of Frauds, for the ex-

facts: Marshall sold land to E., who sold a portion to Mo., who part performed; Mo. sold to A. and P., who also part performed; there being a dispute as to Mo.'s title (and *semble* that on the pleadings the court might presume it a written one); E. conveyed the land by deed to A. and P., reciting that Mo. had no title (*semble* that this recital would be interpreted to mean no legal title); A. and P. conveyed by deed to Clary, who partly performed, with notice to Marshall's heirs. Pending this transaction E. got a decree of specific performance against Marshall's heirs, and got specific performance of his contract with Marshall. Lastly, Marshall's heirs brought a bill of review against E., and showed that the first decree gave him more land than his contract called for, and got a reversal, under which the Commissioner allotted them, as part of the surplus, Clary's land; it was held that Marshall's heirs could not object to E.'s voluntary conveyance to A. and P.; that a parol vendor can, if he chooses,

comply with the Statute of Frauds; that Clary, not being party to the bill of review, was not bound by the decree in that case; and finally, that Clary's title was good as against Marshall, because E.'s allotment to Mo. was with Marshall's assent, and was followed by part performance, and that Marshall received payment for this particular land; that a contract within the Statute of Frauds is not void; that a deed made under such contract cut out an intermediate sale; that a stranger cannot object to fulfillment of the contract, and that there is a moral duty on the obligor in parol contract within the Statute of Frauds to fulfill it; Clary v. Marshall, 5 B. Mon. 269.

(u) Watts v. Watts, L. R. 17 Eq. Ca. 221.

(v) Lavender v. Hall, 60 Ala. 214; the plaintiff, *semble*, did not get possession of the cotton from C. before the defendant took it.

(w) Wood v. McGuire, 21 Ga. 583.

ecution creditor could not avail himself of the statute.(x) Where the defendant had sold cattle to K., and K. resold part to the plaintiff and with the latter visited the defendant, K. taking his cattle away, and the plaintiff arranging with the defendant for the keep of his. The defendant cannot claim that the sale from K. to the plaintiff was within the Statute of Frauds.(y)

Where the plaintiffs claim in ejectment under a parol sale without delivery of possession, if the vendors testify on their behalf to the fact of the sale, and do not interpose any claim, the defendants, who are mere intruders having possession, cannot set up the Statute of Frauds.(z)

§ 652. That an express trust is oral cannot be set up by a stranger.(a) The delivery of a title bond to a trustee wherewith to pay a debt due the *cestui que trust*, and manual delivery of the bond by the trustee to the *cestui que trust*, who discharged the debt, were held to satisfy the Statute of Frauds.(b) It has been held, however, that a trustee holding a surplus under a deed of trust for the grantor, cannot retain this to meet a subsequent oral engagement of the grantor's within the Statute of Frauds.(c)

An administratrix is not bound to set up the Statute of Frauds.(d) An administrator who has promised to pay debts due by the intestate in consideration of the creditors delaying for such a time that their claim became barred by the Statute of Limitations, is not obliged in an action to charge himself personally to plead the Statute of Frauds for the ultimate benefit of the next of kin of the intestate.(e) The executors of the vendor who has orally sold the land may plead the Statute of Frauds, but need not do so.(f)

Where a vendee showed an oral contract with a testator, part performance in the latter's lifetime, a written agreement with one of

(x) *McCormick v. Drummatt*, 9 Neb. 387.

(y) *Brown v. Hall*, 5 Lans. 179.

(z) *Christy v. Brien*, 14 Pa. St. 249; see *Ryan v. Tomlinson*, 39 Cal. 644.

(a) *Chicago Dock v. Kinzie*, 49 Ill. 289.

(b) *Wilborn v. Spofford*, 4 Sneed, 705.

(c) *Williams v. Hill*, 19 How. U. S. 250.

(d) (*Re*) *Garratt's Trust*, 18 W. R. 684; the claim was for a marriage portion promised by the intestate to his daughter, and of which a part was paid on the wedding day.

(e) *Ames v. Jackson*, 115 Mass. 512, citing *Cahill v. Bigelow*, 18 Pick. 370.

(f) *Lee v. Colston*, 5 Mon. 246; see *Schoul. Executors*.

his executors, and payment and further part performance with the assent of the executors, the Statute of Frauds was held to be satisfied.^(g) A decedent made a verbal contract to sell lands; his heir-at-law who administered sold the lands under the verbal contract. It was held that while he might have repudiated his ancestor's bargain as being within the Statute of Frauds, yet that having advisedly carried this contract out, the fund resulting therefrom was to be treated as part of the intestate's personal estate.^(h)

A public escheator can plead the Statute of Frauds, as has been seen; whether he must do so is a different question.⁽ⁱ⁾ It has been held that where the sheriff fails to make the memorandum under the Statute of Frauds, he cannot it seems waive the statute in a suit against him for specific performance; the original owner must be made party defendant, and he may plead the statute.^(j) Where a telegraph company is sued for incorrectly sending a message which related to a sale within the statute, the suit not being on the contract itself, the rules of pleading relating to the statute do not apply.^(k)

§ 653. As will be seen, a creditor cannot object if his debtor and another party to an oral contract within the statute choose to carry out the contract, though it may be to the disadvantage of the creditor that this should be done; the converse of the rule is true, and a creditor can perform such a contract though the debtor object. Thus, as we have seen, a guarantor may fulfill the oral guaranty and recover from the party answered for, and this in spite of the express objection of the latter.^(l) Thus, where a mortgagee sells under a power in the mortgage, and at the sale no sufficient memorandum to satisfy the Statute of Frauds is made, the sale can nevertheless be carried out by the parties thereto in spite of the objection of the mortgagor.^(m)

Where the plaintiff, an execution debtor, was allowed by the defendant, his creditor, to remain in possession of his land under an oral agreement that if the plaintiff should resell and pay the

(g) *Taylor v. Adams*, 2 S. & R. 534.

(h) *Frayne v. Taylor*, 33 L. J. Ch. 228.

(i) *Sebben v. Trevezant*, 3 Desaus. 217.

(j) *Witham v. Smith*, 5 U. C. Ch. 206.

(k) *Western Union Tel. Co. v. Hopkins*, 49 Ind. 226.

(l) See *supra*.

(m) *Lewis v. Wells*, 50 Ala. 205.

defendant his debt, he the plaintiff might keep the land; and the plaintiff did so resell to one D., who paid the defendant an amount not much less than that which the plaintiff was to pay; the whole matter being in parol, D. and the defendant rescinded the sale and applied D.'s payment to a debt due by D. to the defendant, who thereupon brought ejectment for the land and a suit for the money which the plaintiff originally owed him. The present plaintiff brought a bill to enjoin these suits, or to have a decree for the money paid the defendant by D.; it was held that upon the rescission of the sale to D. he became entitled to have his money back, and could therefore apply the amount to his own debt to the defendant; the bill therefore was dismissed.(n)

Where T. & S. drew a note to the order of the defendant and to get it discounted the plaintiff's endorsement was procured, and the latter irregularly endorsed above the defendant. The latter paid one-half the amount of the note, and on threat of suit by the holder, the plaintiff paid the other half; it was held that he could recover this, the note being good against T. & S. and the defendant, and irregular only as against the plaintiff, who could waive the irregularity.(o) Where the plaintiff as broker sold defendant's land by parol to the F. P. C., and defendant upon being asked to pay the commission, said that he had withdrawn the sale of the land, but afterwards conveyed it to the F. P. C. He cannot, in a suit for the commission, defend on the ground that the contract was by parol, and that when this suit was begun no purchase-money had been paid; for it appeared that the purchaser was ready and willing to go on.(p)

§ 654. A debtor can fulfill a contract invalid under the Statute of Frauds, even as against the interest of his creditors. The parties do not have to set up the statute, and a creditor cannot.(q) Thus a creditor of the vendor cannot object that the latter fulfills his oral sale or levy upon the land as the property of the vendor.(r) There are a few authorities in which the right of a creditor to object has been upheld. Thus an oral gift of land invalid under the Statute of Frauds cannot, under the statutes of Elizabeth, be consummated as against

Debtor may
fulfill as
against cred-
itors;
contra.

(n) *Beaman v. Buck*, 9 Sm. & M. 210.

(q) *Cresswell v. McCaig*, 11 Neb. 227.

(o) *Slack v. Kirk*, 67 Pa. St. 384.

(r) *Rickards v. Cunningham*, 10 Neb.

(p) *Mooney v. Elder*, 56 N. Y. 241. 420.

creditors.(s) And carrying this rule a step further, it was held in New York that a creditor to whom a security was given to indemnify him against an invalid oral guaranty which he had given for the debtor, could not, as against other creditors, retain the security; because to do so would work a preference.(t)

An oral promise, made at the time a debt is contracted, to give security if required, cannot be executed after the debtor has become insolvent.(u) So where under an oral sale of goods, there was no sufficient delivery and acceptance to satisfy the Statute of Frauds, and the seller at the buyer's request removed the goods to another locality with the intention of selling them on the buyer's behalf, it was held that a third person attaching them as the property of the seller could take advantage of the Statute of Frauds, because no title at the time of the levy had passed to the buyer, and because any other rule than this would work great fraud upon creditors.(v)

It is not easy to reconcile these cases with the general current of authority, especially with the rule that under a voluntary performance the title vests at the time of the original oral contract.(w) The first two cases, it will be observed, are gifts, which may be well excepted from the ordinary rule, and the last one shows the acquisition of an actual lien by execution upon the property before any effectual attempt to assign the debtor's title had been made. The case of *Morton v. Hudson* can perhaps only be upheld because of the policy of an insolvency or bankruptcy which searches out and defeats all preferences, whether executed or only executory.

§ 655. A garnishee can insist upon performing an oral guaranty, and rely upon it in his answer.(x) The following is an example of

(s) *Rucker v. Abell*, 8 B. Mon. 568; *Hubbard v. Allen*, 59 Ala. 293.

(t) *Morton v. Hudson*, 1 Hoff. Ch. 314 (this was under an insolvency law which did not forbid preferences, but under which the courts would carefully scrutinize these; see *Burdick v. Jackson*, 7 Hun, 490; *Stowell v. Haslitt*, 5 Lans. 385.

(u) *Lloyd v. Strobbridge*, 10 Chic. Leg. News, 1 (U.S. D. C. Cal.); the court cited (*In re*) *Jackson Manuf. Co.*, 15 Nat. Bank. Reg. 445, and said: "It is suggested that perhaps a security given on the faith

of a contemporaneous oral promise to give a definite security might be sustained, on the ground that the money advanced was so far part performance of the contract, as to entitle to specific performance. But that does not take the case out of the Statute of Frauds, i. e. the payment of purchase-money."

(v) *Ely v. Ormsby*, 12 Barb. 571; see *supra* as to when title vests under an invalid oral contract subsequently performed.

(w) See § 648.

(x) *Cahill v. Bigelow*, 18 Pick. 370;

Garnishee can voluntarily perform.

the garnishee's right to perform: Where the plaintiff issued an attachment in which *Estes* was the debtor, and *Merrill* and *Quint* garnishees, the following facts appeared. *Estes* orally sold land to *Quint* worth \$1200; *Quint* agreed to part pay \$700 in logs. Then a mortgage of \$750 on the land is discovered; *Estes*, *Quint*, and *Merrill* then agreed that *Quint* should pay \$500 and give up his logs to *Merill*, both of which he did, and *Merrill* agreed to take up the mortgage and indemnify *Estes* against it. *Merrill* and *Quint* are then served with the present attachment; after the attachment *Merrill* paid the mortgage, and claims he owes *Estes* nothing; and it was held that *Estes* could not have objected to or prevented *Merrill's* paying the mortgage, nor can *Estes'* creditors do so, because the arrangement was for *Quint's* benefit not *Estes'*, *Quint* having given up his logs, under the contract, and taken a conveyance of the land. And the court observed, that had *Merrill* refused to fulfill his contract (as it seems he could not have done relying on the Statute of Frauds), he would have owed a debt to *Estes* as well as *Quint*, and the attachment would have held.(y)

The rule that a garnishee can perform as against the attachment an oral guaranty made before the latter, is denied in *Vermont*.(z)

see *Drake* on Attach., § 595; *Wart v. Mann*, 124 Mass. 587; *McCoy v. Williams*, 6 Ill. 589, citing *Weed v. Jewett*, 2 Metc. 608; *Sweet v. Ordway*, 23 Pick. 367.

(y) *Owen v. Estes*, 5 Mass. 331.

(z) *Seemle Strong v. Mitchell*, 19 Vt. 648, citing *Hazeltine v. Page*. Thus where in 1827, *Page* gave to *Parker* a promissory note of \$900, payable in five years, *Hazeltine* brought an attachment against *Page* as garnishee, and *Parker* defendant, debtor; afterwards *Page* paid the \$900 partly in cash and partly in two notes due on demand, and *Page* entered into certain guaranties on *Parker's* behalf, one of which was in writing and valid, and the others were oral and invalid. Afterwards *Hazeltine* brought a second attachment suit against the same parties; it was

held that in this last suit, *Page* should have credit for the valid written guaranty, but not for the invalid oral ones. It would appear that *Hazeltine* had a right to bring a second attachment pending the first, though the report of the case does not mention but one debt due him by *Parker*. His reason for bringing the second suit was, perhaps, in order to attach the debts due by *Page* to *Parker*; under the later arrangement between the latter these debts being due on demand while the promissory note first attached was not due for five years. By bringing the second suit, *Hazeltine* would seem to have adopted the later arrangement between *Page* and *Parker*, which was substituted for the first promissory note; *Hazeltine v. Page*, 4 Vt. 49.

§ 656. A vendor of land under an oral contract can fulfill it in despite of his creditors.(a) The Statute of Frauds can only be pleaded by him who has a legal estate, upon which it is attempted to put a trust, and a creditor of the grantor of the trust cannot do so.(b) No one but the original vendor in an oral sale of land can set up the Statute of Frauds.(c)

Where a vendee of land under an oral sale who has paid part of purchase-money, sells out to a third party who refunds him his expenditure, the former has no attachable interest in the land.(d) Where, under an oral contract, the vendee of land who paid no consideration for the latter, reconveyed to his vendor, his the vendee's creditors cannot object to this as voluntary.(e) The parties to a conveyance of land by which, through an unregistered deed, an equitable title passed can rescind the contract by repaying the price and redelivering the deed; and a creditor of the vendee cannot object.(f)

Not only cannot a creditor prevent the parties to an oral sale of land from fulfilling it, but still less can a creditor of the vendee compel the vendor to fulfill.(g) A voluntary performance of an oral contract to give a mortgage is good as against creditors, even

(a) *Lefferson v. Dallas*, 20 Ohio St. 68; *Crawford v. Woods*, 6 Bush, 200; *Minns v. Morse*, 15 Ohio, 571.

(b) *O'Neale v. Caldwell*, 3 Cr. C. C. 312.

(c) *Kratz v. Stocke*, 42 Mo. 355; see *Hill v. Smith*, 12 Rich. 700.

The following case is also an example of the rule. Summer, a defendant, orally sold ninety-seven acres of land to E. F., represented by J. D. Francis, another defendant, and either gave a title bond which was lost or agreed to give one; in a trust deed of mortgage of a larger tract to W. B. for the benefit of D. M. J., Summer reserved expressly the land he had conveyed E. F. without describing it, and in a subsequent conveyance of this larger tract he reserved expressly the seventy-nine acres sold E. F. (eleven acres being repurchased by him and *semble* an error of seven acres); E. F. gave Summer

notes for the purchase-money, and these Summer assigned to Roberts, plaintiff, who sues on them to enforce the vendor's lien. Alexander, a third defendant, claims, under a sheriff's sale, Summer's title in the land—Summer in his answer claimed the legal title, but admitted the equitable title to be in the heir of E. F., but did not set up the Statute of Frauds, nor did Francis; Alexander did, however. It was held that the parties under whom Alexander took, having waived the statute, he could not set it up, as he took Summer's interest while the present suit was pending; *Roberts v. Francis, Summer, and Alexander*, 2 Heisk. 133.

(d) *Wood v. Thomas*, 2 Head, 162.

(e) *Sackett v. Spencer*, 65 Pa. St. 89.

(f) *Davis v. Inscoc*, 84 N. Car. 400, citing *Mirzell v. Burnett*, 4 Jones L. 249; *Green v. R. R.*, 77 N. Car. 95.

(g) *Logan v. Hale*, 42 Cal. 645.

though made but a few days before the filing of a petition in bankruptcy.(h) The fulfillment of a verbal guaranty given in consideration of the receipt of a chattel (*i. e.* a negro) will give the guarantor a good title to such negro as against creditors of the party answered for; the oral guaranty was, however, not within the Statute of Frauds.(i)

§ 657. The rule of voluntary performance has also been applied to contracts in consideration of marriage. Thus in California it has been held that an ante-nuptial contract, executed by the parties after marriage, cannot be assailed by either the parties or by third persons.(j) A verbal gift it seems executed, of personal property to the separate use of a married woman, is good even against creditors in Alabama.(k) Where a deed is made of land and the price is paid and possession taken, and afterwards, in fulfillment of the original oral contract of sale, the wife joins in the conveyance so as to pass the homestead right, the conveyance is good as against a creditor of the husband.(l)

Where a husband never reduced money of his wife's to possession, but which by his consent and under an oral ante-nuptial contract she retained, it was held in an early chancery case in New York that the husband could not get it, and that his creditor's rights were no greater than his.(m) Where there was an oral ante-nuptial contract by which the intending husband's wife relinquished to the latter's mother, who was also her guardian and in possession of the property both realty and personalty, all the intended wife's estate; the contract was held to have been entirely performed as

(h) *Burdick v. Jackson*, 7 Hun, 490, citing many cases. See *Stowell v. Haslit*, 5 Lans. 385; see, however, *Morton v. Hudson*, 1 Hoff. Ch. 314, *supra*.

(i) *Jenkins v. Peace*, 1 Jones, Law, 416; as to guaranty see *supra*.

(j) *Hussey v. Castle*, 41 Cal. 242; see *Butterfield v. Stanton*, 44 Miss. 33.

(k) *Machen v. Machen*, 38 Ala. 369, citing cases; see *Dyger v. Remerschnider*, 32 N. Y. 629.

A man who had bought land from the trustee of certain minors, and who owed a large part of the price, which

was secured by a mortgage, agreed with the mother, whom he was about to marry, that as the land was not worth the amount of the mortgage, the debt and mortgage should be canceled and that he should convey the land to the children; it was held that, as the debt and mortgage were in fact so canceled before marriage, a post-nuptial conveyance of the land was good as against creditors, the land being worth less than the amount of the mortgage debt.

(l) *Goodell v. Blumer*, 41 Wis. 443.

(m) *Smith v. Kane*, 2 Paige, Ch. 303.

against a creditor of the husband, there being nothing more for the parties to do than to refrain from claiming the property.(n)

§ 658. An action to recover the price of land which has been conveyed is not barred by the Statute of Frauds.(o) And where the contract of sale is in writing, it has been held that the price may be reserved by parol; but the weight of authority is opposed to this last conclusion.(p) Where deeds have been delivered under an oral partition the owelty can be recovered in *assumpsit*.(q) In Pennsylvania, where an oral sale of land is good so far as its enforcement will not have the effect of transferring the title to land in violation of the first three sections of the Statute of Frauds, which in substance have been adopted in that State, it has been held after the land is conveyed that *assumpsit* will lie for the price.(r)

Price of land conveyed under an oral sale may be recovered.

Where a vendor under an oral sale of land is willing to go on, the vendee is liable on notes for the price.(s) It has been suggested, in a late case in the Tennessee Chancery, that a vendor cannot recover back the land when the vendee is willing to pay the price; but whether actual conveyance is meant or only a transfer of possession is not clear.(t) A special promise to pay a mere pre-existing

(n) *Andrew v. Jones*, 10 Ala. 400, citing cases; see *Southerland v. Southerland*, 5 Bush, 593.

(o) *Butler v. Lee*, 11 Ala. 885; *Clark v. Brown*, 1 Root, 78; *Cone v. Tracy*, 1 Root, 479; *Palmer v. Logan*, 3 Scamm. 57; *Worden v. Sharp*, 56 Ill. 104; *Beard v. Converse*, 84 Ill. 512; *Hadden v. Johnson*, 7 Ind. 396; *Fisher v. Wilson*, 18 Ind. 133; *Gwaltney v. Wheeler*, 26 Ind. 415; *Curran v. Curran*, 40 Ind. 478; *Ferguson v. Ramsey*, 41 Ind. 512; *Huston v. Stewart*, 64 Ind. 395; *Smith v. Phelps*, 32 Ia. 537; *Gully v. Grubbs*, 1 J. J. Marsh, 388; *King v. Hanna*, 9 B. Mon. 372; *Morgan v. Bitzenberger*, 3 Gill, 350; *Preble v. Baldwin*, 6 Cush. 549; *Nutting v. Dickinson*, 8 Allen, 542; *Basford v. Pearson*, 9 Allen, 390; *Trowbridge v. Wetherbee*, 11 Allen, 363; *Wilkinson v. Scott*, 17 Mass. 251; *Brackett v. Evans*, 1 Cush. 79; *Holland*

v. Hoyt, 14 Mich. 238; *Fiske v. McGregory*, 34 N. H. 418; *Shepherd v. Little*, 14 Johns. 211; *Bowen v. Bell*, 20 Johns. 338; *Ely v. McKnight*, 30 How. Pr. 101; *Dow v. Way*, 64 Barb. 257; *Tut-hill v. Roberts*, 22 Hun, 305; *Farmer v. Willard*, 71 N. Car. 286; *Randall v. Turner*, 17 Ohio St. 262; *Tripp v. Bishop*, 56 Pa. St. 423; *Wood v. Gee*, 3 McCord, 421; *Hibbard v. Whitney*, 13 Vt. 24 (*dictum*); *Thayer v. Viles*, 23 Vt. 497; *Ascutney Bank v. Ormsby*, 28 Vt. 721; *Yerby v. Grigsby*, 9 Leigh, 387. (p) *Gully v. Grubbs*, 1 J. J. Marsh. 387.

(q) *Baxter v. Gray*, 14 Conn. 119.

(r) *Horbach v. Gray*, 8 Watts, 497.

(s) *Rhodes v. Storr*, 7 Ala. 346.

(t) *Bloomstein v. Clees*, 3 Tenn. Ch. 439, citing *Biggs v. Johnson*, 2 L. & Eq. Rep. 587, not yet reported in the regular series.

debt is not within the statute, though the origin of the debt was the oral sale of land conveyed by the promisee to the promisor.(u) And a plea to a suit for money received from the sale of land, that the sale was oral, is insufficient.(v)

An implied promise to pay over money received as the price of a release to a third party by the plaintiff of a certain warranty relating to land is not within the statute, the release having been executed.(w) And where one who has held land voluntarily waived the Statute of Frauds, and conveyed the land in accordance with an oral contract, he is entitled to keep money which he exacted from the other party as the condition upon which he would convey.(x) Where the defendant bought land under a joint contract, took the plaintiff's money, but applied it elsewhere, the contract of purchase was held to be fully performed, the fraud being in the misapplication of the money.(y)

Where suit is brought to recover the purchase-money of land, and the contract of sale has not been performed by the execution and delivery of a deed, the plaintiff must allege and prove that he has good title to the land. But if the defendant has accepted a deed of the property, the law is otherwise, and to oust a justice of jurisdiction of the case, it must affirmatively appear on the face of the proceedings, that the defendant has not accepted a deed of the property, but that the contract is still executory.(z) Where Frieze, the plaintiff, the administrator of R. F., to whom was awarded a share of the estate of A. F. under the latter's will, brought suit for the same, the administrators of A. F. defended on the ground that R. F. had become the purchaser of real estate belonging to A. F. decreed to be sold; had been unable to comply with the terms of sale, and had finally, under a parol agreement that the purchase-money should be applied to the payment of incumbrances and other debts owed by her, R. F., sold the land, and that these debts, &c., exceeded the purchase-money by a balance, which, therefore, the defendants claimed, was due them by R. F. It was held that if the Statute of Frauds applied to this parol agreement (a point not admitted), the above acts on the part of de-

(u) *Dillingham v. Runnels*, 4 Mass. 400.

(v) *Ferguson v. Ramsey*, 41 Ind. 511.

(w) *Bliss v. Thompson*, 4 Mass. 488.

(x) *Gilpatrick v. Sayward*, 5 Me. 465.

(y) *Willink v. Vandever*, 1 Barb. 599.

(z) *Cole v. Hynes*, 46 Md. 185, citing authorities.

defendant were a sufficient part performance.(a) Where the plaintiff conveyed land to the defendant's testator under an oral contract that the latter, if he should enjoy twenty years' undisturbed possession, should pay the plaintiff \$250, it was held, after the twenty years' enjoyment that the defendant's testator's estate was liable for this money.(b)

If the vendor of land has performed his part he can, under the common counts, recover the unpaid balance of the value of the property conveyed, and need not restore what he has received, but may credit this against his claim for the value of the land conveyed.(c)

§ 659. The rule as it has been given above prevails generally in America, but in England there is authority for qualifying this by the requirement that there shall be a new ^{English} promise to pay for the land conveyed. The leading case is *Cocking v. Ward*, in which the court said: "As the special count in this action is framed upon the very contract itself, to enforce the payment by the defendant of the sum stipulated to be paid as the price of the interest in the land which the plaintiff gave up, and to which the defendant succeeded, we think the contract itself cannot be considered as altogether executed so long as the defendant's part still remains to be performed. And the case appears to us to fall within the principle adverted to by *Le Blanc, J.*, in *Griffith v. Young*, and, further, we think the case of *Buttemere v. Hayes* is an authority in point that the present contract, though executed on the part of the plaintiff, yet, not being executed on the part of the defendant also, is still to be considered as a contract within the Statute of Frauds."(d)

Where a person proposing to lease on condition that certain repairs would be paid for by the lessor, and took lease and repaired; it seems that parol evidence of such agreement would be inadmissible under the Statute of Frauds, and as altering the writing; but

(a) *Frieze v. Glenn et al.*, 2 Md. Ch. 288; 45 L. J. Q. B. 179, in which Lord Blackburn said: "As I pointed out in *Dec. 364.*

(b) *Little v. Little*, 36 N. H. 229, citing cases. See *Horbach v. Gray*, 8 Watts, 497. if *Tindal, C. J.*, meant that the statute applied to executed consideration; he

(c) *Thomas v. Dickinson*, 14 Barb. 90.

(d) *Cocking v. Ward*, 1 M. G. & Sc. 867; see *Pulbrook v. Lawes*, 1 Q. B. D. 2 C. B. 808." *year after; see Souche v. Sarawbridge,*

the moral obligation will support a subsequent promise to the same effect made by the defendant, who has received the benefit of the repairs, the contract having been fully performed.(e)

In a Canada case, where a plaintiff sued as on an account stated, and the proof was that he had by writing bought land from the defendant, and that it was afterwards verbally agreed that the sale should be canceled and the defendant, to be rid of his bargain and sell to another, should return the plaintiff what he, the latter, had paid, and \$102; and the evidence left it doubtful whether a parol acknowledgment of liability made by the defendant was before or after the cancellation of the old bargain and the new sale; a new trial was ordered, and *Cocking v. Ward* was cited, to the effect that where land is sold and nothing is left to be done but the payment of the price, the remedy is in an account stated; and that there must be an acknowledgment of indebtedness made after the transfer.(f)

In Vermont it was held that to an action for the price of land conveyed or agreed to be conveyed and taken into possession by the vendee, the Statute of Frauds is no bar; and upon the point whether the promise to pay the consideration for land conveyed to the promisor was within the Statute of Frauds, the court considered *Cocking v. Ward*, 1 C. B. 867, *Kelly v. Webster*, 12 C. B. 283, and *Smart v. Harding*, 15 C. B. 652, to settle the affirmative as to the English law; but that the American rule was the other way.(g)

The following is an example of the application of the American rule: The fact that a certain stipulation is made at the same time as, and formed part of, an arrangement for the sale of an interest in land does not prevent an action from being maintained upon it; provided that the action does not tend to enforce the sale or purchase of an interest in land, and that in other respects the stipulation is susceptible of being separately enforced by action; that where H. and B. and the defendant and the plaintiff agreed to purchase land, the defendant and the plaintiff agreed to furnish the purchase-money,

(e) *Seago v. Deane*, 1 M. & Payne, 233; 3 C. & Payne, 170.

(f) *Gross v. Bricker*, 18 U. C. Q. B. 412.

(g) *Hodges v. Green*, 28 Vt. 358; see *Wetherbee v. Potter*, 99 Mass. 361, cit-

ing for the English rule *Kelly v. Webster*, 12 C. B. 283, also, and saying that where, as in Massachusetts, the memorandum does not state the consideration, the rule of *Cocking v. Ward* does not apply.

that the drafts for the purchase-money should be drawn on the plaintiff, and the defendant should reimburse the plaintiff to the extent of one-half; it was held that the promise to reimburse was not within the Statute of Frauds after the land had been purchased, and not being within the statute could be enforced.^(h)

§ 660. An interesting and difficult question arises when, after conveyance of the actual title to land, a separate stipulation is sought to be enforced. Thus, where the plaintiff agreed to transfer to the defendant his interest in a corporation, and the defendant agreed to convey the plaintiff a certain farm and to indemnify him against liability on certain notes which the plaintiff had given on behalf of the corporation, it was held that the Statute of Frauds did not apply to a suit on the indemnity brought after a conveyance of the land.⁽ⁱ⁾

How far executory oral stipulations are enforceable after title to land has been conveyed; as against vendee; as against vendor.

There is some conflict of decision even in America as to how far an execution of that part of the contract to which the Statute of Frauds more directly applies, amounts to full performance and renders the executory portion of the agreement enforceable. Thus in New York it was held that where a party to a contract invalid by the Statute of Frauds has voluntarily performed, he cannot therefore be compelled to perform the residue; and this though he has performed all that part of the contract which is within the statute, and the residue upon which the action is brought is void only by reason of the part already performed; that the cases where a recovery is permitted for money paid or services performed upon an invalid contract, are those where the action is brought in disaffirmance of such contract and not in affirmance of it and with a view of enforcing it. In the case in question the defendant had engaged by parol to have certain premises for which he had made a bargain of purchase conveyed to plaintiff, unincumbered, for a certain sum; the plaintiff paid the sum and the defendant had the property conveyed to him the plaintiff; it was held that in an action at law for certain taxes and assessments afterwards discovered to have been due on the property, the plaintiff could not recover.^(j)

Where the defendant orally agreed to sell the plaintiff a house,

(h) *Wetherbee v. Potter*, 99 Mass. 361.

(j) *Baldwin v. Palmer*, 10 N. Y. 334,

(i) *Alger v. Scoville*, 1 Gray, 391.

citing cases.

and to put certain labor upon it, for a fixed price to be paid by the plaintiff as the consideration of the entire contract, and the plaintiff did so pay, and the defendant did so convey but did not bestow the labor called for by the oral contract; it was held that the Statute of Frauds, though it did not directly apply to the contract as to the labor, yet that, the agreement being entire, the statute was a bar to an action for not bestowing the labor.^(k) The three cases last considered are really the converse of the question under consideration. In these cases it is not a vendor who has conveyed who is suing for the price, but a vendee who is seeking to hold a vendor for engagements collateral to that of conveying the land.

In conformity to these decisions, it has been held in Vermont that no action lies by the vendee against the vendor on a collateral oral contract forming a part of the sale of the land, and therefore within the Statute of Frauds, merely because of the conveyance of the land, inasmuch as this is a full performance only of the contract to sell, and not of the collateral promise, as that, for example, of a warranty that the land sold should contain at least a given number of acres.^(l) The court said: "It has been held in several of the States, as well as in this State, that where the contract for the sale of land, or for an interest in land, has been fully executed by a conveyance, payment therefor may be enforced by an action; but we think no case is to be found in which the purchaser, upon payment of the purchase-money, has been held entitled to maintain an action to recover damages of the other party, for refusing to convey, or to perform any other stipulation of the contract touching the sale of land or an interest in land."

Though it was said, in a Tennessee case, that an oral promise to have land resurveyed and to settle for the excess or the diminution which might be found, was good, and in this instance the promise was made after the deed had been made and accepted.^(m) Yet the ordinary class of cases in which a recovery has been allowed on an oral promise are those in which it is the vendor who is suing for an excess of land conveyed beyond what was agreed upon; here obviously there is no question as to the land—the object of the

(k) *Dow v. Way*, 64 Barb. 257, citing and considering many cases.

(l) *Dyer v. Graves*, 37 Vt. 376, citing *Ballard v. Bond*, 32 Vt. 355; and *Hodgson*

v. Johnson, E. B. & E. 685, citing for the ordinary rule of voluntary performance, *Ascutney Bank v. Ormsby*, 28 Vt. 721.

(m) *Seward v. Mitchell*, 1 Coldw. 89.

suit is money merely,⁽ⁿ⁾ and the oral collateral contract to pay for any excess of acreage beyond that named in the deed is not merged in the deeds of conveyance or the notes given for the price.^(o) And where the price paid fell short of the sum produced by multiplying the number of acres by the price per acre, the vendor in a Canada case was allowed his lien, though the tract had been conveyed as a whole and the contract as to the excess was oral.^(p)

Another feature of the present question is where the promise by the vendee is to pay a different or further consideration than that named in the conveyance. It has been held in Canada, it seems, that the vendor can recover.^(q) It has been held that an oral agreement to pay separately for an equitable title belonging to the vendor is good when a deed has been given and accepted, though the deed recited a smaller consideration.^(r) So an oral promise by the vendee, who receives a deed for the land, to pay a further sum for it out of the proceeds when he resells, is not within the Statute of Frauds.^(s)

The converse of this is a point in much doubt. Though the ordinary rule is, as we have seen, that collateral agreements are not in general enforceable against a vendor, yet it has been held in England that where the plaintiff agreed to give the defendant a certain sum for his tenant right, &c., and the defendant agreed to repay part of the price if the plaintiff should not be able to obtain from the proper authorities a license to use the property for a certain purpose, and the plaintiff took possession and was refused the license, the action lay for the rebatement agreed upon, the part of contract within the Statute of Frauds having been executed.^(t)

A New York authority, not unlike the above, was as follows: The defendant promised the plaintiff to pay the latter for his services in selling land \$300 if the latter would sell the land for \$30,000; and under these terms the defendant promised to convey

(n) *Mott v. Hurd*, 1 Root, 74, citing *Gillet v. Burr* (*semble* not reported); *McConnell v. Brayner*, 63 Mo. 461, citing a number of cases.

(o) *Ludeke v. Sutherland*, 87 Ill. 482.

(p) *Kitchen v. Boon*, 24 Grant, Ch. 197.

(q) *Rochleau v. Bidwell*, Dra. Rep. (U. C.) 366.

(r) *Pierce v. Weymouth*, 45 Me. 482.

(s) *Price v. Sturgis*, 44 Cal. 495; see as to liability for the consideration after the part within the statute has been fulfilled, *Jervis v. Berridge*, L. R. 8 Ch. App. 359; *Christie v. Dowker*, 10 Grant, Ch. 200.

(t) *Green v. Saddington*, 7 E. & B. 507; *Crompton, J.*, doubting.

the land to any purchaser found by the plaintiff, and to make the deed to the plaintiff in the first instance. The latter sold the land for \$31,500, and the defendant conveyed to the purchaser; it was held that the Statute of Frauds was a bar to a recovery of the \$300 and of the \$1500.(u)

It has been said in Pennsylvania that a collateral agreement, whether valid or not, was at least of no effect to prevent the vendor recovering the price of land actually conveyed.(v) Where the defendant had sued the complainant at law for the price of certain land sold, and this suit was brought in equity to enjoin the action at law, and it appeared that the sale was an oral one, that the defendant had not as yet given the complainant a good title nor procured it for him from certain third persons who claimed to be owners; it was held that, the consideration of the contract having failed, the complainant was entitled to his decree, because, while the Chancellor would not dissolve the contract merely because oral, yet in this case the plaintiff would not be allowed in equity to recover at law when he was not ready to carry out his part of the contract.(w)

Where the plaintiff bought from W. and sold at an advance to the defendant's intestate, who took a deed from W. and paid him, W., the price agreed with the plaintiff to be paid him, but did not pay the plaintiff, it was held that the Statute of Frauds applied.(x) Where there was a purchase of land by deed without covenants, the vendee could not set up an agreement by the vendor to pay incumbrances; which, even if valid if independent, was part of an unenforceable oral contract.(y)

§ 661. There is an exception to the rule that the conveyance of the land under an oral contract satisfies the Statute of Frauds, which is admitted universally; and that is, where the contract is in the nature of an exchange; and where a contract is on both sides for an interest in land, performance of one side will not comply with the statute.(z)

(u) *Badenhop v. McCahill*, 42 How. Pr. 195, distinguishing and doubting *Fiero v. Fiero*, 52 Barb. 288, on the ground that in that case there was no agreement to convey the land; and distinguishing and citing several cases.

(v) *Horbach v. Gray*, 8 Watts, 497.

(w) *Craig v. Prather*, 2 B. Mon. 9.

(z) *Simms v. Killian*, 12 Ired. 253.

(y) *Robson v. Harwell*, 6 Ga. 605
Duncan v. Blair, 5 Denio, 196.

(s) *Townsend v. Townsend*, 6 Metc.

Where a deed has conveyed all that the parties intended that it should convey, an oral agreement that there should be a subsequent deed for the remainder of an entire tract orally sold is an independent agreement within the Statute of Frauds, and the deed is not a performance thereof.(a)

Where there is an oral agreement that the defendant shall convey a tract of land and pay a sum of money to the plaintiff in consideration that the latter shall make a deed confirming a sale of another tract to the defendant, though executed by the plaintiff, is within the Statute of Frauds.(b)

§ 662. Taking up the leading principle before us, the point of first importance is what constitutes full performance; and in illustration of the latter the following examples ^{What is full performance.} may serve better than definitions. Thus, after receipt of price and execution of deed, a grantor of land cannot claim that the sale under which the deed was made was not evidenced by writing.(c) An oral contract to buy certain poles, to cut the timber and make and carry the poles, is a good foundation for an action for the consideration when executed by cutting and carrying away the poles.(d)

Where the defendant on behalf of a turnpike corporation prom-

319; *Hibbard v. Whitney*, 13 Vt. 21, citing cases; see *Greenham v. Watt*, 25 U. C. Q. B. 365.

The plaintiff sued for price of land sold, and added the common counts. The plaintiff's land had been sold to one O.; it was agreed O. should let defendant have the benefit of his bid; defendant agreed to pay the plaintiff \$600, of which he paid \$200 down; O. was to take the sheriff's deed for the land; the plaintiff was to have two years to redeem, by the repaying the \$200, or defendant, if this was not done, was to pay the remaining \$400. O. conveyed to the defendant. The plaintiff never redeemed, and sued for the \$400. The court said the contract to reconvey was clearly within the Statute of Frauds. It was also said that the contract of sale by the plaintiff was void, and the promise by the defendant to pay the \$600 was without consideration,

as, though technically the legal title to the land was in the plaintiff until the sheriff's sale, he had no control over it, and no beneficial interest in the land; *Van Alstine v. Wimple*, 5 Cow. 163, citing *Lexington v. Clarke*, 2 Vent. 223, *Chater v. Beckett*, 7 T. R. 204, *Crawford v. Morrell*, 8 Johns. 253, *Hall v. Schutz*, 4 id. 243, *Sherrill v. Crosby*, 14 id. 361, *Movan v. Hays*, 1 Johns. Ch. 339; *Botsford v. Burr*, 2 id. 408; and *Steere v. Steere*, 5 id. 11, was said to have same bearing.

(a) *Broughton v. Coffey*, 18 Grattan, 197.

(b) *Chambers v. Lecompte*, 9 Mo. 575; see *Galbraith v. McLain*, 84 Ill. 381, where it was held that the contract, though apparently, was not really for an interest in land on both sides.

(c) *Pope v. Chafee*, 14 Rich. Eq. 73.

(d) *Teal v. Auty*, 2 B. & Bing. 299; 4 Moore, 546.

ised to pay the plaintiff so much money, whereupon the latter let the corporation "have his land," it was held that the plaintiff might recover, though he had signed no memorandum binding himself to convey, and had not in fact conveyed; the road had however been located over the plaintiff's land, so that the corporation had it within the meaning of the agreement.(e) Notes given for the price of land cannot be defended on the ground that the sale was a judicial one, and that till decree the title had not passed, the defendant having been let into possession.(f)

Where the plaintiff, a tenant imprisoned under process issued to recover rent not paid, agreed to surrender the land and certain chattels thereon on consideration of being released, and his brother thereupon puts the defendant into corporal possession of the land and chattels, but no writing was executed; it was held that the present action to recover damages for the defendant's failure to release the plaintiff from prison was not barred by the Statute of Frauds, as the agreement to surrender had been fully performed.(g) A church society wishing to alter its meeting-house, arranged to buy the plaintiff's pew, having a purpose of buying all of a certain class of pews; finding that they could get all of the pews they wanted, they went on to alter their meeting-house, and in so doing they destroyed the identity of the plaintiff's pew; afterwards the plaintiff offered them a deed of his pew, and demanded the price they had verbally agreed to give; it was held that though a pew was real estate the contract was executed, the pew taken by the defendants, and an action for the consideration was not within the Statute of Frauds.(h)

A submission to arbitration of damages incurred by a road run through the land relates only to damages, and is not within the Statute of Frauds.(i) An agreement by the petitioner for a road and the owner of the land over which the road was to go, was held to be fully performed when the jury took it into consideration in fixing the damages due the owner, and when the petitioner took

(e) *Tucker v. Bass*, 5 Mass. 164.

(f) *Worthington v. McRoberts*, 7 Ala. 814; see *White v. Beard*, 5 Porter (Ala.), 100.

(g) *Power v. St. George*, 11 Irish Rep. 110; see *Pope v. Devereux*, 5 Gray, 412,

where an old right of way was given up and a new one substituted for it.

(h) *Hodges v. Green*, 28 Vt. 360, citing cases.

(i) *Gillanders v. (Lord) Rossmore*, 1 Jones, Ir. Exch. 507.

possession of his road.(j) The price of land sold was recited in the deed as to be fixed by referees; it was decided that though neither the price nor even the referees were named in the deed, the parties having attended the meetings of the referees and agreed to the reference; the Statute of Frauds was no defence for the vendee; the latter had not taken a deed or gone into possession.(k)

An agreement to remove a fence and open a road to its original width is not a contract relating to land within the Statute of Frauds, or one sufficient to deprive a justice of the peace of his jurisdiction; the fence had been removed, and the suit was for the consideration which the defendant had promised the plaintiff for so doing.(l) Where a machine was bought and received and tried, and found not to comply with a warranty and was then returned, the Statute of Frauds is no defence to a suit on the warranty for the expense which the plaintiff has been at in transporting and trying the machine; the oral contract had been executed.(m)

Where the plaintiff leased for twenty-one years land to the defendants, who afterwards took P. as a partner, and the defendants agreed that if the plaintiff would improve the premises they would pay part of the cost; this agreement, it was held, need not be in writing, and the improvements having been made, the share of the cost which the defendants had promised to pay could be recovered in *assumpsit*; and the original lease as such remained unaffected, and only the rent therein agreed upon could be enforced by the distress; the two contracts, that is to say, were independent of each other.(n)

§ 663. The mode and amount of payment calls for further consideration than that already incidentally given to it. It may be said generally that an oral agreement as to the mode of payment is not within the Statute of Frauds.(o) Not only is there a recovery by ordinary suit, but where by law the vendor's lien is recognized, such a lien will be allowed where there has been full performance.(p) In a Canada case in which suit had been brought for a horse, part of

Mode and amount of payment; vendor's lien; additional consideration.

(j) *Greenwalt v. Horner*, 6 S. & R. 71.

(k) *Brown v. Bellows*, 4 Pick. 189.

(l) *Storms v. Snyder*, 10 Johns. 109.

(m) *Northwood v. Rennie*, 28 U. C. C. P. 209.

(n) *Hoby v. Roebuck*, 7 Taunt. 156; see *Horbach v. Gray*, 8 Watts, 497.

(o) *Moody v. Smith*, 70 N. Y. 599;

Carscaden v. Shore, 17 U. C. C. P. 497.

(p) *Hamilton v. Gilbert*, 2 Heisk.

the consideration of land conveyed by the plaintiff to the defendant, it was said that the vendor could establish his lien in equity, but that he had no remedy at law.(q)

The following are some examples of special modes of payment. A promise by the vendee to pay a personal annuity to the plaintiff for the latter's life, in consideration of the conveyance of land, will be enforced.(r) Where the defendant was the plaintiff's tenant, and wishing to give up his tenancy in favor of P., which he could not do without defendant's consent, promised the plaintiff that if she would give her consent, P. should pay £100 for the good-will, and of this he would pay the plaintiff £40; P. paid £100 and got the tenancy; this contract being executed, the Statute of Frauds did not apply.(s) Where the defendant agreed that if the plaintiffs would become tenants of certain land instead of himself, he would repay them any arrears of rent or taxes they might have to pay; they became tenants in his place and had to pay taxes for which they sue; it was held not to be within the fourth section of 29 Car. II., as all that related to the land was executed.(t)

A verbal agreement by a vendee who has received his deed to pay a further sum for the land when he shall sell it, is not within the Statute of Frauds, "being not for the conveyance of land but for the payment of a certain sum of money upon the happening of a certain event."(u) An oral agreement to pay separately for an equitable title of the vendors is good when the latter have given and the vendees have accepted a deed of the land, though the deed recited the receipt of a smaller sum.(v)

Where the seller of goods delivered and paid for agrees that if

681; *Shennan v. Parrell*, 18 Grant, Ch. 10; *Briscoe v. Bronough*, 1 Tex. 330; *Magruder v. Campbell*, 40 Ala. 622.

(q) *Taylor v. Knowles*, 30 U. C. Q. B. 205.

(r) *Clifford v. Turrell*, 9 Jur. 633; 14 L. J. Ch. 390, 6 Jur. 5, 1 You. C. 138.

(s) *Griffith v. Young*, 12 East, 514.

(t) *Price v. Leyburn*, 1 Gow, 109.

(u) *Price v. Sturgis*, 44 Cal. 495.

(v) *Pierce v. Weymouth*, 45 Me. 482.

Where the plaintiffs sold their share in land to the defendant upon certain

representations; the sum they received was less than their share of what a certain G., who had warranted the title of the land, afterwards paid defendant to release him from the warranty; in a suit for money had and received and setting up the misrepresentations the Statute of Frauds was held no bar to a recovery of the share of the money so paid by G. to the defendant, as the contract was not one relating to land, but merely an implied *assumpsit* to pay money; *Bliss v. Thompson*, 4 Mass. 491.

certain duties on the goods are rebated he will hand over the amount allowed by the Government to the buyer ; it was held that the Statute of Frauds did not apply, as this was not the sale of a claim or chose in action, but an item of a contract taken out of the statute by performance.(w)

§ 664. Growing crops can be orally reserved from a deed of land ; they are part of the price or consideration ; and the execution of the deed is a performance of the contract to satisfy the Statute of Frauds ; where the vendor has harvested the crops, the vendee cannot set off the value in a suit for the price.(x) Where a contract invalid under the Statute of Frauds was made between the plaintiff and the defendant, by which the former was to furnish seed and sow certain land of the defendant, harvest the crop and deliver a portion to the defendant, and keep the rest himself ; and this agreement was rescinded, and the defendant promised to pay the plaintiff for his labor in sowing the crop ; it was held that the latter promise was not within the Statute of Frauds.(y)

Growing
crops ; ac-
counts
stated.

A recovery is sometimes allowed on the theory that the contract is in the nature of an account stated. Thus, in an action upon an account stated, it appeared that the plaintiff had had an interest in a piece of land which he assigned to the defendants as security for a debt ; they on the other hand owed him for work done, and the balance on accounting found due the plaintiff was £22, the labor and the land exceeding by that amount the plaintiff's debt to the defendants ; the latter orally agreeing to take the plaintiff's interest in the land as being of a certain value ; the land was conveyed to the defendants, and this suit was brought for the £22 ; and the plaintiff was allowed to recover.(z) That an item in an account stated represents the price of land sold does not necessitate written proof, as the Statute of Frauds does not apply.(a)

Where a father, intending to make a certain division of his property among his children, buys for one of his sons a farm more

(w) *Allen v. Aguirre*, 3 Seld. 544 ; 10 Barb. 74 ; 5 N. Y. Leg. Obs. 380.

(z) *Heavilon v. Heavilon*, 29 Ind. 512, citing cases.

(y) *Moore v. Ross*, 11 N. H. 547, citing cases.

(s) *Laycock v. Pickles*, 4 B. & S. 497 ;

in argument *Mellor, J.*, said that under *Falmouth v. Thomas*, 1 Cr. & M. 106, the Statute of Frauds applied to an account stated ; *Blackburn, J.*, said that in that case the account consisted of a single item.

(a) *Dalton v. Botta*, Tayl. (U. C.) 386.

valuable than the latter's share, and conveys the farm ; it was held that the father's executor could recover from the son upon this contract as an advancement evidenced by an account stated, and that the Statute of Frauds did not apply.(b) On the other hand, where the defendant, who had made a verbal agreement to buy a lease from the plaintiff, deposited an I. O. U. with him for £25, and afterwards refused to carry out the purchase ; it was held that plaintiff could not recover on the I. O. U. as being an account stated.(c)

§ 665. When the title is taken by one and part of the interest in the land or its proceeds is in another, the effect of voluntary performance of the oral contract comes sometimes into question : Thus, where the plaintiffs sold land to the defendant by an agreement under seal, passing the equitable title in the land then held by the plaintiffs ; the legal title was conveyed by H. to assignees of the defendant with the assent of the plaintiffs ; it was held that the only claim which the plaintiffs had against the defendant was for the payment of the purchase-money, and this could be proved by oral evidence, and that the Statute of Frauds did not apply.(d)

Where the plaintiff, a parol vendee of land, sold his interest also orally to the defendant, to whom the vendor conveyed at the plaintiff's request ; it was held, the Statute of Frauds was no defence to a suit for the difference between the price paid by the defendant and the value of the land.(e) Where the plaintiff's intestate, being indebted to R. G., allowed the latter to sell a tract belonging to the former and to recover his debt by doing so ; R. G., under this verbal arrangement, sold the land to Gibson, under whom the defendant claims, for \$810, taking for the price Gibson's notes to himself, and the plaintiff's intestate, at R. G.'s request, conveyed the land direct to Gibson ; it was held that the transaction, which was in the nature of an equitable mortgage, was executed and not within the Statute of Frauds.(f)

(b) *McBride v. Parnell*, 4 U. C. K. B. O. S. 154 ; *Gross v. Bricker*, 18 U. C. Q. B. 412 ; and see *Dynes v. O'Neil*, 1 Cr. & Dix, 331 ; *Bliss v. Thompson*, 4 Mass. 491, for examples of accounts stated in this connection.

(c) *Lemere v. Elliott*, 6 Hurlst. & N. 659.

(d) *Bonner v. Campbell*, 48 Pa. St. 289.

(e) *McCarthy v. Pope*, 52 Cal. 565 ; *Mayer v. Child*, 47 Cal. 144, distinguished as a case where the vendor refused to carry out the agreement ; *Seaman v. Price*, 10 Moo. 37, cited, and *Kratz v. Stocke*, 42 Mo. 355.

(f) *Perkins v. Gibson*, 51 Miss. 702.

Where A. sold by parol land to C., father of Mrs. Hamilton the plaintiff, C. sold to Gilbert the defendant; and A. at C.'s request conveyed directly to the defendant, who gave notes for the price to Mrs. Hamilton at C.'s request; it was held that the latter had a vendor's lien; it is the same as if Mrs. Hamilton had been the actual vendor and had made the deed to the defendant.(g)

§ 666. When the promise to pay the price of land conveyed is evidenced by promissory notes given therefor, the performance to satisfy the Statute of Frauds is all the more complete. When the vendor is willing to convey the land, the vendee is liable on notes given for the price.(h) A lessee is *a fortiori* liable for the rent after his enjoyment of the term, when he has given notes for the rent.(i)

Promissory
notes.

Where by parol land was sold and the price was agreed to be paid in installments, and after some time a note for the price then due and a deed for the land was given; a contract as to the interest during the time the payment was delayed may be made by parol; it is not within the Statute of Frauds, being a mere incident of the contract.(j) It has even been held that a plea that the note in suit was given under an oral sale of land is insufficient if possession has been delivered; for the part performance is sufficient consideration for the note, when a deed has not been refused.(k) Where, under an oral contract of exchange of land, a check is given for part of the price payable in money, and a receipt for the check specifies that the check was received on the exchange of the land, it was held that the check was upon a good consideration.(l)

(g) *Hamilton v. Gilbert*, 2 Heisk. 681, citing cases. For another example of title taken in another's name and the Statute of Frauds held to be satisfied by actual performance, and the vendor's lien allowed, see *Shennan v. Parsill*, 18 Grant, Ch. 10. But see *Simms v. Killian*, 12 Ired. 253, a case where the Statute of Frauds was held to apply.

(h) *McGowan v. West*, 7 Mo. 569; *Rhodes v. Storr*, 7 Ala. 346; *Jones v. Jones*, 6 M. & W. 88.

(i) *Gibson v. Wilcozen*, 16 Ind. 233.

(j) *Prevo v. Lathrop*, 1 Scamm. 305.

(k) *McDowel v. Delap*, 2 Marsh. 33; *Edelin v. Clarkson*, 3 B. Mon. 31; *Ott v. Garland*, 7 Mo. 28.

(l) *Raubitschek v. Blank*, 80 N. Y. 479; 44 N. Y. Super. 564. Oral evidence of the time of sale of land and chattels was admitted in a suit on a note for the purchase-money; the contract having been executed by a deed given by the vendor and a mortgage and note given by the vendee; the evidence going only to show who was the real owner of the note, and whether the note was still in force; *Smith v. Sergeant*, 67 Barb. 246; 2 Hun, 107; 4 Th.

Where the vendee agreed to pay for land by giving a third person's note guaranteed by him; and in accordance with this he tendered a note endorsed by him "without recourse," which the vendor read to be "without reserve," and upon discovering his mistake, sent back the note and sued for the price; the court said: "This action, in its second count, is for the recovery of the price of real estate sold and conveyed. As a contract for the sale of land it is taken out of the Statute of Frauds, by the conveyance executed by the plaintiff and accepted by the defendant. The count sets forth an agreement, by which the price of the land was to be paid in part by two notes of a third party, which the defendant agreed to guarantee. That agreement also was within the Statute of Frauds, as a special promise to answer for the debt of another. Gen. Sts. c. 105, § 1, cl. 2. But the action in this count is not brought upon that agreement. It alleges that the defendant refused to perform it on his part, and therefore that the plaintiff is entitled to recover, and the defendant owes him the balance of the price of the land. This is in accordance with a well-recognized rule of very general application, that when one has advanced the consideration or any part of it upon a contract within the Statute of Frauds, and the other refuses to perform his agreement, the first, having no remedy upon the contract itself, may recover back the consideration paid. And if the consideration was in land conveyed an action will lie upon the implied promise to pay its price or value." (m)

Where a vendee under an oral contract sells his bargain and lets the defendants take title, it was held that the defendants were liable on a note given by them to the above vendee for the consideration of the second sale. (n) Where the plaintiff sold land to H. and took his notes, and the latter sold to the defendant, and the plaintiff at H.'s direction reserved part of the purchase-money to meet the notes; it was held that the Statute of Frauds was not a bar in a suit for the amount of the unpaid notes of H. (o) Where the vendee under an oral contract of sale takes a

& C. 684; see for an example of suit on a note given under an executed sale of land, *Vimont v. Stitt*, 6 B. Mon. 474.

(m) *Root v. Burt*, 118 Mass. 523, citing *Wetherbee v. Potter*, 99 Mass. 354;

Basford v. Pearson, 9 Allen, 387; *Dix v. Marcy*, 116 Mass. 416; *Cook v. Doggett*, 2 Allen, 440.

(n) *Kratz v. Stocke*, 42 Mo. 351.

(o) *Dearborn v. Parks*, 5 Greenl. 81.

title bond for the land and gives a note for the price, and goes into undisturbed possession, he cannot resist the payment of the notes.(p)

Where a purchaser, who has by parol promised to buy at an execution for the defendant therein, he is not bound to do so; but if he resells and takes notes for the price, and places these notes in the hands of a third person for the benefit of such defendant, the latter may sue the third person for the proceeds of the notes when collected.(q) It is no defence to an action on notes given for the price of land that the sale was a judicial one, and that till decree the title has not passed, the defendant being in possession.(r) But in Alabama there must be full performance, and a note given for the price of land sold is without consideration, though the vendee held possession and had made a part payment; the doctrine of equitable part performance not prevailing in that State.(s)

In a Texas case it was held that in a suit on a promissory note, and to have a vendor's lien enforced, evidence of an oral sale is not admissible under the Statute of Frauds.(t) So in Indiana a plea as follows is good, viz., that the consideration of the note in suit was an oral contract to convey land, which one W., the vendor, would neither reduce to writing nor fulfill; the want of mutuality being fatal.(u)

§ 667. The next point for consideration is the question how far the delivery and acceptance of a deed is necessary in order to charge a vendee for the payment of the price, or for the performance of any other stipulation contained in the deed. The general rule is that when the deed has been accepted the Statute of Frauds is no bar to an action for the price.(v) A simple writing is enough where the recovery is not sought as on the legal title.(w) The general rule ap-

How far a deed or writing is necessary; delivery of deed how far sufficient.

- (p) *White v. Beard*, 5 Port. (Ala.) 100. *Pomeroy v. Winship*, 12 Mass. 523;
 (q) *Garrett v. Garrett*, 27 Ala. 691. *Brackett v. Evans*, 1 Cushing, 79; *Bassett v. Bassett*, 55 Me. 131; *Swishelm v. Swisshelm & Co.*, 95 Pa. St. 367; *Corson v. Mulvany*, 49 Pa. St. 98; *Hibbard v. Whitney*, 13 Vt. 21 (*dictum*); *Hodges v. Green*, 28 Vt. 358; *King v. Smith*, 33 Vt. 25; *Thomas v. Ross*, 19 U. C. Q. B. 372. And see *supra*.
 (r) *Worthington v. McRoberts*, 7 Ala. 814; see *White v. Beard*, 5 Port. (Ala.) 100.
 (s) *Bates v. Terrell*, 7 Ala. 134.
 (t) *Farmer v. Simpson*, 6 Tex. 307.
 (u) *Clark v. Harrison*, 5 Blackf. 303.
 (v) *Gwaltney v. Wheeler*, 26 Ind. 415; *Sands v. Thompson*, 43 Ind. 21; *King v. Hanna*, 9 B. Mon. 370, 371; 159.
 (w) *Jenkins v. Williams*, 16 Gray,

plies to the sale of chattels.(x) In an early Illinois case it would seem that parol proof of a lost deed was admitted, and that the conveyance being proved, parol evidence of the price is admissible in a suit for the money.(y) A title bond binds the vendee when he accepts it, though the vendor only has executed it.(z)

Where there are covenants of warranty, a vendor, though he may not set up a trust, may show non-payment of the price.(a) Where the plaintiff executed a bond covenanting for a certain price to be paid by the defendant to procure for him the patents for certain land, and he procured these in the defendant's name and offered them to him, but the defendant put him off, telling him to keep them for the present; the court held that the contract was fully executed and not within the Statute of Frauds.(b)

§ 668. The following are some examples where the rule has been held not to apply. Thus, where the vendee of land made a part payment and the vendor delivered the deed in escrow, subject to an entire payment; the contract was held not to be performed, and the Statute of Frauds to be a defence to a suit for the price.(c) The tender of a deed not accepted is not full performance.(d) A vendee is not liable on his written promise to pay for land orally sold him, where he has demanded a conveyance and been refused it; the plaintiff should have proved a tender of a deed and demand for the money.(e) In a North Carolina case it was held, where a vendor gave a title bond for the land and the vendee agreed orally to pay a debt of the vendor to a third person, that though the guaranty clause of the Statute of Frauds did not apply, the land clause did.(f)

§ 669. The acceptance of a deed, even a deed-poll, renders the vendee liable not merely for the price, but for any other assumption contained in the deed.(g) In a Wisconsin case it was said that "It is settled in this court that the

- Acceptance of deed-poll makes the vendee lia-
- (x) *Bates v. Moore*, 2 Bailey, 614.
 - (y) *Palmer v. Logan*, 4 Ill. 57.
 - (z) *Vilas v. Dickinson*, 13 Wis. 488; but see *Rice v. Carter*, 11 Ired. 299.
 - (a) *Rathbun v. Rathbun*, 6 Barb. 98.
 - (b) *Kilburn v. Forester*, Drap. (U. C.) 346.
 - (c) *Cagger v. Lansing*, 43 N. Y. 550.
 - (d) *Sands v. Thompson*, 43 Ind. 21;

Wilson v. Clarke, 1 W. & S. 556; *King v. Smith*, 33 Vt. 25.

(e) *Smith v. Henry*, 7 Ark. 213.

(f) *Rice v. Carter*, 11 Ired. 299, citing cases, and distinguishing *Smith v. Lewis*, 24 Conn. 641, as a case where deeds had been executed in which the payment of the purchase-money was recited.

(g) *Trezevant v. Bettis*, 5 Cent. L. J.

acceptance, by the grantee, of a deed or land contract executed by the grantor alone, binds such grantee. Hence, the instrument signed by the plaintiff alone, and accepted by the defendant, is as much the written agreement of the latter as it is of the former.”(h)

The acceptance of an indenture binds the grantee to its stipulations, though he does not sign.(i) An invalid oral contract executed by the plaintiff by the execution of a deed and by the defendant by taking the benefit of the contract, is binding upon the latter.(j) A person not signing who accepts a written contract signed by the other party is bound as if he signed, even though the contract was mutually executory; contracts may be mutual though the parties have different remedies as against each other, the one on the deed, the other on an oral contract. When the bargain is executed no want of mutuality can be set up, and even in equity, if the party not bound does his part a decree will be made against the other. This case was that of a deed sealed and accepted, but not signed by the grantee.(k)

A grantee not signing is bound by the stipulations of the deed, but is not estopped to deny his grantor's title to certain land reserved therein from the operation of the deed.(l) An oral promise by the vendor, made after the deed is made, but before it is delivered, to pay the taxes on the land, is not within the Statute of Frauds, and being after the deed is not merged in the latter.(m) A bill of lading accepted by consignor, though prepared by consignee's agent, binds the former, though not signed by him.(n)

221 (S. C. Tennessee, Sept. T. 1876); *Goodwin v. Gilbert*, 9 Mass. 510; *Elting v. Clinton Mills Co.* 36 Conn. 362; *Hinsdale v. Humphrey*, 15 Conn. 436; see *Wales v. Sherwood*, 1 Abb. N. C. 101 n.; *Collins v. Rowe*, Id. 99; and see “Deed;” *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; 50 Barb. 135 (seem even as to deed-poll); *Long v. Bullard*, 59 Ga. 358; *Cincinnati &c. R. R. v. Pearce*, 28 Ind. 506; *Schmucker v. Sibert*, 18 Kan. 104; *Greenham v. Watt*, 25 U. C. Q. B. 369.

(h) *Hubbard v. Marshall*, 50 Wis. 327, citing cases.

(i) *Chamberlain v. Parker*, 45 N. Y. (6 Hand), 571.

(j) *Johnson v. Hathorn*, 2 Keyes, 476; 3 id. 132; 2 Abb. Dec. 465.

(k) *Grove v. Hodges*, 55 Pa. St. 515.

(l) *Champlain Co. v. Valentine*, 19 Barb. 484.

(m) *Remington v. Palmer*, 62 N. Y. 34.

(n) *Cincinnati &c. R. R. v. Pontius*, 19 Ohio St. 237. For other examples of contract as to chattels see *Knight v. Worsted Co.*, 2 Cushing, 289; *Pawle v. Gunn*, 4 Bingh. N. C. 448.

§ 670. The most ordinary application of the rule now under consideration is that of a promise to pay mortgages or other incumbrances on the land sold. A promise by the grantee of land to pay a mortgage thereon is binding though oral, after the deed has been accepted.^(o) Acceptance of a deed stipulating for the personal assumption by the vendee of a mortgage on land will bind the vendee though he does not sign.^(p) Where the deed recites the debt as being a note secured by mortgage, the vendee is liable to the holder of the note.^(q)

In this class of cases, the acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance, binds him as effectually as though the deed had been *inter partes* and had been executed by both grantor and grantee.^(r) The grantee of a deed-poll, it has been held in Connecticut, which imposes upon the grantee the obligation to pay a mortgage on the land, and save the grantor harmless therefrom, can be sued by the mortgagees, and cannot defend on the ground of the Statute of Frauds, which, it was said, did not apply to deeds-poll.^(s)

Where the plaintiff, the owner of mortgaged premises, conveyed them by deed-poll to the defendant, and under such circumstances as to show that the contract between the parties was that the grantee should assume liability for the payment of the mortgage; it was held that after the conveyance of the premises the Statute of Frauds was no bar to an action by the grantor against the grantee for reimbursement for the mortgage interest paid; Shaw, C. J., saying promises implied in law are not within the Statute of Frauds.^(t)

^(o) *Murray v. Smith*, 1 Duer, 429, citing cases.

^(p) *Crawford v. Edwards*, 33 Mich. 359.

^(q) *Fitzgerald v. Barker*, 70 Mo. 687; *Cushman v. Garrison*, 2 Cincin. Super. 146; see *Schmucker v. Sibert*, 18 Kan. 111, citing cases.

^(r) *Trotter v. Hughes*, 12 N. Y. 78, citing cases. Where a new license from the Canadian government to cut timber on certain lands was obtained by the plaintiff, who had already been such a licensee, and he obtained the license in the name of I. N. & Co.; the latter's

names were entered on the official books, and the license given by the plaintiff to them; they, with the plaintiff's assent, pledged the license for money advanced under an oral agreement; it was held by a divided court that though the license represented an interest within the Statute of Frauds, yet that there had been complete execution, and the plaintiff could not object that the obligation fulfilled by I. N. & Co. was an oral one within the Statute; *McDonald v. McKay*, 18 Grant, Ch. 103.

^(s) *Foster v. Atwater*, 42 Conn. 250.

^(t) *Pike v. Brown*, 7 Cushing, 136.

A promise to lend money to buy certain property, the borrower to secure the loan on the property, can be sued on by the borrower when he has executed the security.^(u)

A promise to mortgage, fully performed by the plaintiff and as to all but one item by the defendant, is not within the Statute of Frauds.^(v) An agreement by the buyer of a mortgage past due not to collect the principal for five years, for which he received a money consideration from the buyer of the land subject to the mortgage, was held to be executed and not within the "Year" clause of the statute.^(w) Where R. conveys land as security to the defendant, who advances for the plaintiff, the obligee in a title bond, the Statute of Frauds is no bar in a suit by the plaintiff, who offers to reimburse.^(x)

An oral promise given by the mortgagee to release the mortgagor, if the latter will convey to a third person, can be enforced by the mortgagor after such conveyance.^(y) The payment of the consideration for the release of a mortgage passes the title to the releasee, and the Statute of Frauds has nothing to do with the right to release.^(z)

Where a conveyance is made as security for a small debt of the grantor assumed by the grantee, though no action at law will lie for the value of the land, an action will lie for the amount paid by the plaintiff under the indemnity given by the plaintiff to the defendant, if the latter refuses to reconvey; but not at law for the value of the land, whatever may be the rule in equity.^(a) In a case in the Queen's Bench of Upper Canada it was considered that the full performance was not sufficiently shown, and a promise by the defendant to take a second mortgage was not enforced, though the mortgages were, it would seem, delivered, but the land subject to a prior mortgage was not taken possession of by the defendant.^(b)

In the converse case of the liability of the vendor to the vendee

^(u) *Fitch v. Seymour*, 9 Metc. (Mass.) 482; *Bridges v. Purcell*, 1 Dev. & B. 492; *Seymour v. Carter*, 2 Metc. (Mass.) 520; *McCue v. Smith*, 9 Minn. 258; *Clement v. Durgin*, 5 Greenl. 9.

^(v) *Swain v. Seamens*, 9 Wall. 254.

^(w) *Dodge v. Crandall*, 30 N. Y. 294.

^(x) *Cousins v. Wall*, 3 Jones, Eq. 43.

^(y) *Coyle v. Davis*, 20 Wis. 564.

^(z) *Malins v. Brown*, 4 Comst. 410.

^(a) *Greer v. Greer*, 18 Me. 16.

^(b) *Johnstone v. Cowan*, 25 U. C. Q. B. 470; see *Christie v. Dowker*, 10 Grant, Ch. 200, where a forbearance given to a mortgagor was held not to take the latter's special promise as to the debt out of the Statute of Frauds.

the general rule has sometimes been applied: as where an oral promise by the vendor of land subject to a mortgage which was an apparent incumbrance thereon, that if the vendee would procure a decree declaring the mortgage paid and canceled, the vendor would reimburse him his outlay in so doing, was not within the Statute of Frauds.(c) Where there was a purchase of land by deed without covenants, it has been held that the vendee cannot set up a promise by the vendor to pay incumbrances, which, even if valid of itself, is part of a non-enforceable oral contract.(d)

§ 671. A promise to pay rent is not within the Statute of Frauds after the lessee has accepted a demise of the land; as implied promises are not within the statute.(e) So a promise by the vendor to pay the taxes on the land;(f) or such a promise by the vendee(g) where, in the case of an exchange, one party orally promises to pay the incumbrances on the land which he was to take, the actual exchange satisfies the Statute of Frauds.(h)

Where there has been a partition, a promise by one of the partitioners, in consideration of getting better land, to pay the other and help the latter improve his land, is not, at least in equity, within the Statute of Frauds.(i) Where deeds have been delivered under an ordinary voluntary partition *in pais*, the owelty can be recovered.(j) The acceptance of a devise which is made upon a condition, binds the devisee, though the conditional stipulation was within the Statute of Frauds, the promise being an implied one.(k)

§ 672. Promises to improve or repair land, &c., conveyed, are not within the Statute of Frauds; thus, where a deed-poll stipulating that vendee shall fence the land is accepted, the vendee is liable in a suit for damages for not fencing, as this is a personal contract, not binding the land, and not

(c) Ely v. Bardin, 12 N. Y. W. Dig. 206.

(d) Robson v. Harwell, 6 Ga. 605; Duncan v. Blair, 5 Denio, 196.

(e) Hodges v. Howard, 5 R. I. 149; Providence &c. Union v. Elliott, 22 Alb. L. J. 274 (S. C. R. I), citing cases.

(f) Remington v. Palmer, 62 N. Y. 34; Price v. Leyburn, 1 Gow, 109.

(g) Brackett v. Evans, 1 Cushing, 79.

(h) Dock v. Hart, 7 W. & S. 174.

For further examples of oral promises to assume incumbrances, see Baldwin v. Palmer, 10 N. Y. 334; Scott v. Anderson, 2 Ir. Jur. N. S. 422; Chapman v. Allen, Kirby, 399; Davenport v. Mason, 15 Mass. 92.

(i) Green v. Vardiman, 2 Blackf. 324.

(j) Baxter v. Gay, 14 Conn. 119.

(k) Felch v. Taylor, 13 Pick. 136.

within the Statute of Frauds.^(l) Where the plaintiff sold land to the defendant by parol, agreeing, among other things, to remove a certain building on the land; and the plaintiff conveyed the land, took part of the price in cash, and part on mortgage; a foreclosure sale still left part of price unpaid; and there was an action on the bond for the balance; it was held that the Statute of Frauds does not prevent the defendant setting up the failure of the plaintiff to remove the building, as orally promised; the performance had satisfied the Statute.^(m)

Where, under the oral contract, the purchaser of land was to build a fence, but did not do it, and nothing was said in the deed as to his doing so, it has been held that the vendor, having built the fence, might recover its cost from the vendee.⁽ⁿ⁾ Where a landlord agreed to put certain improvements on his tenant's property to the extent of £50, and the tenant agreed to pay £5 a year more during the remainder of his term, which would not expire for several years; and the landlord made the improvements and sued for the additional £5; it was held that this was not an interest in land either in the tenant, whose rights in the land were not in any way affected by it, and was not an interest in land in the landlord, for the £5 was not additional rent; it could not have been distrained for; it was a mere personal contract, and not within the Statute of Frauds.^(o)

Under an oral contract of sale, the vendor promised to repair; after conveyance the vendee can sue on this promise, the deed not being exclusive evidence of the contract.^(p) Where the defendant orally agrees to convey land and fill it up to a certain level in consideration of a certain price, the plaintiff, the vendee, after conveyance made, can sue for the breach of the promise to fill up.^(q)

After a deed given of water-right, evidence is admissible on the ground of fraud, of an executed contract to alter the water-course.^(r) Where S., grantor of the defendant, reserved in his deed, *inter alia*, as follows: "And the said Latham and his successor are to keep a

(l) *Harriman v. Park*, 55 N. H. 472.

(m) *Supervisors of Schenectady v. McQueen*, 15 Hun, 554.

(n) *Frazer v. Buder*, 3 L. & Eq. Rep. 622 (S. C. Ia.)

(o) *Donellan v. Read*, 3 B. & Ad. 904,

citing *Hoby v. Roebuck*, 7 Taunt. 156; see also *Seago v. Deane*, 1 M. & Payne, 233; 3 C. & P. 170.

(p) *Manning v. Jones*, 1 Busb. L. 368.

(q) *Page v. Monks*, 5 Gray, 492.

(r) *Lefevre v. Lefevre*, 4 S. & R. 241.

spout ten inches square in the inside, at the bottom of said ditch, to which the said grantor shall at all times have access for the purpose of drawing water as aforesaid ;" the court said : " That the respondent, by accepting the deed containing this provision, thereby agreed to perform this duty, there can be no doubt. This duty was a part of the consideration of his deed. The respondent has received full compensation, and it is difficult to see why he is not bound to perform it." (s)

It seems that a contract that the plaintiff should build a party-wall on his own and on the defendant's ground, if executed is not within the Statute of Frauds ; and the plaintiff could have recovered of the defendant what the latter promised to pay for his share ; but the defendant having conveyed his land with the plaintiff's knowledge before the wall was built, the latter can recover nothing from the defendant, as he had no interest in the wall when it was built. (t)

The principle of voluntary performance has been applied to guaranties ; thus, the defendant was surviving partner of S. & Co., who, having been about to trade with the plaintiff, agreed with him to apply the firm's payment to an old debt due by S. to the plaintiff ; this, it seems, while executory, is within the Statute of Frauds ; it was held that the payments having been applied to the account of S., and no new account of S. & Co. having been opened, the guaranty was executed and the Statute of Frauds did not apply ; the defendant wished to apply the payments to the debts of S. & Co., and to treat the S. account as executory and within the statute ; but the court held that S.'s debt had been paid, and that the debts of S. & Co. remained unpaid ; to these there was in fact no defence. (u)

§ 673. The last question for our consideration arising under the subject of full performance is the nature of the remedy. Practice and remedies. It may be stated as generally true, that when a contract within the Statute of Frauds is executed on one side the law will imply a correlative promise, and on this latter an action of *assumpsit* will lie. (v) The action to recover the price of land orally sold is on the implied and not on the special prom-

(s) *Randall v. Latham*, 36 Conn. 49, citing cases.

(t) *Rice v. Roberts*, 24 Wis. 464.

(u) *Mueller v. Wiebracht*, 47 Mo. 470 ; see also *Muller v. Maxwell*, 2 Bosw. 359.

(v) *Gully v. Grubbs*, 1 J. J. Marsh. 387 ; *Hilton v. Duncan*, 1 Coldw. 313 ; *Shepherd v. Little*, 14 Johns. 211 ; *Urquhart v. Brayton*, 12 R. I. 170.

ise.(w) Where a person not signing has accepted a written contract he is liable, for a contract may be mutual, though the parties to the contract or deed may have, as against each other, different remedies.(x)

In most States the action is *assumpsit* and not covenant; as where a lessee is sued for rent, having accepted but not signed the deed of demise.(y) In a Pennsylvania case, however, it was said that "both parties have signed and sealed this agreement, and the language of the instrument clearly imports a covenant on part of the defendant to pay the purchase-money, if he elects to purchase. The language of a writing may be wholly that of a vendor, yet the vendee's sealing or accepting it will bind him, and whether the action against him should be case or covenant is not material;" and citing *Meade v. Weaver*, 7 Pa. St. 330, the court said that "in the last-mentioned case, the effort of Chief Justice Gibson was to show that covenant would not lie when the party had not sealed the writing; however, debt or *assumpsit* might. The English authorities cited in that case conclusively show that the entry of the grantee, or his acceptance of a deed-poll, are equivalent to sealing, and covenant will lie."(z)

In New Jersey it was held that "an indenture of bargain and sale purporting to be *inter partes*, by which an estate is conveyed to the grantee, if the grantee accept the deed and the estate therein conveyed, though an indenture be not sealed and delivered by him, is his deed as well as the deed of the grantor."(a) Certain unsealed writings are by Kentucky statutes ranked with covenants; the verbal acceptance or any acceptance *in pais* of such a writing renders the party so accepting liable in covenant.(b) Possession taken and a lease executed by the lessor but not by the lessee, renders the latter liable on all the covenants of the deed in Nevada, where different forms of action abolished.(c)

(w) *Fisher v. Wilson*, 18 Ind. 133; *Sheppard's Touch.* 177; 4 Cruise, Dig. 393, "Deed," tit. 32; c. 25, § 4; 3

(z) *Grove v. Hodges*, 55 Pa. St. 515.

(y) *Hinsdale v. Humphrey*, 15 Conn. 436; see generally *Swisshelm v. Swissvale &c. Co.*, 95 Pa. St. 367.

(z) *Corson v. Mulvany*, 49 Pa. St. 98.

(a) *Finley v. Simpson*, 2 Zab. 331, (citing Co. Lit. 231 a, 230 c, note 1;

Com. Dig. "Covenant," A 1, "Fait," A. 2, C. 2; Vin. Ab. C. "Condition," I. a. 2; *Burnett v. Lynch*, 5 Barn. & Cress. 589; *Dyer* 13, C. pl. 66).

(b) *Graves v. Smedes*, 7 Dana, 344.

(c) *Fitton v. Inhabitants of Hamilton*, 6 Nev. 201.

§ 674. The following are a few examples of cases in which the action of *assumpsit* was held not to lie. Thus it has been held that a tender by the vendor in an oral contract for the sale of land of a sufficient deed as required by the terms of the contract to the vendee, who refuses to accept it, is not equivalent in law to an acceptance of the same by the latter, and is not such an execution of the contract as will enable the vendor to recover in an action of *assumpsit* the price of the land.(d) Where there has been no conveyance of the land, *indebitatus assumpsit* will not lie for the price.(e)

Proof of a parol declaration by defendant's testator that he had sold certain land, and that plaintiff's intestate had a part interest in the price, will not without more enable the plaintiff to recover in an action for money had and received.(f) The action when there has been full performance is, as a rule, on the implied and not on the special contract; as in a suit for the price of land conveyed.(g)

Where the plaintiff undertook to obtain for the defendant the conveyance of certain land from a third person, and was to have all of the difference he could arrange between the price he might obtain it at and £26,000, and to have a lease of the premises; the plaintiff obtained the land to be conveyed to the defendant for £25,500, and at that price it was so conveyed, the plaintiff having paid one R. £500 to give up a contract of sale of the land which he, R., had obtained; the plaintiff sued for his £500, and while a verdict was directed to be entered for the defendant on the special counts, the case was left to the jury on the common counts, and they were directed to find for the plaintiff in the amount of the value of his services; the jury brought in a verdict for the plaintiff of £460, which the court refused to disturb.(h) It was said in a Maryland case that where the contract is fully executed and only the money is to be recovered, suit should be brought on the common counts, and that the special contract is part of the *res gestæ*.(i)

(d) King v. Smith, 33 Vt. 22.

(h) Savage v. Canning, 1 Ir. Rep. C.

(e) Thomas v. Roes, 19 U. C. Q. B. 372, L. 434, citing and passing upon a number of cases.

(f) White v. Coombs, 27 Md. 500.

(i) Ellicott v. Peterson (or Turner),

(g) Ridgeley v. Crandall, 4 Md. 435; 4 Md. 476; see Ridgeley v. Crandall, 4 Fisher v. Wilson, 18 Ind. 133; Gully v. Md. 455.

Grubbs, 1 J. J. Marsh. 387; Laycock v.

Pickles, 4 B. & S. 497.

§ 675. In a Maine case it was said that "while it is true that an action cannot be maintained for the breach of a parol promise to convey land, it is also true that when such a promise has been relied upon as the consideration of a conveyance, and the party promising neglects or refuses to keep his promise, the other party may recover the value of his property upon an implied *assumpsit*, and prove the special agreement, not as a basis of recovery, but as a declaration of the defendant bearing upon the question of value, just as any other declaration of a party may be proved. If the plaintiff can show that the defendant was willing, and in fact agreed, to give another piece of property for it that was worth \$2000, it is a practical admission that the property conveyed was worth that sum."^(j)

Under the former system of pleading in New York the plaintiff suing for the price could not declare on the express contract, but was bound to declare on the common counts.^(k) In a Canada case already cited it was held that where a chattel had been bought and tried and rejected, an action on the warranty of it lay to recover the expense of transporting and testing it.^(l) The remedy, as has already been said, will be *assumpsit* on an account stated, when the evidence justifies the inference that there was an accounting between the parties.^(m)

The following is an example of such a recovery: "The action was brought to recover the sum of £3, being the balance due for a quantity of turnips sold by a verbal contract, while they were in the ground. The principal part of the turnips had been removed by the defendant, when the plaintiff said to him, 'You owe me £3.' The defendant replied, 'I will send it before I draw any more turnips.' He afterwards drew the remainder of the turnips, but did not send the money. BEST, C. J.: 'I think that the plaintiff may recover upon the account stated.'" The defendant had contended that the interest sold was one relating to land.⁽ⁿ⁾

It was held that where a contract is within the Statute of Frauds,

(j) *Bassett v. Bassett*, 55 Me. 130, citing authorities; see also *Morehead v. Watkyns*, 5 B. Mon. 229, cited *infra*.

(k) *Dow v. Way*, 64 Barb. 257, citing authorities.

(l) *Northwood v. Rennie*, 28 U. C. C. P. 209.

(m) *Laycock v. Pickles*, 4 B. & S. 497; *Gross v. Bricker*, 18 U. C. Q. B. 412; see *supra*, *McBride v. Parnell*, 4 U. C. K. B. O. S. 154; *Dynes v. O'Neil*, 1 Cr. & Dix, 331.

(n) *Pinchon v. Chilcott*, 3 C. & P. 236.

full performance of it by the plaintiff and part performance by the defendant will not at law take the case out of the Statute of Frauds as to what remains to be done, so as to allow an action to lie on the contract itself; but that if the vendor has performed his part he can under the common counts recover the unpaid balance of the value of the property conveyed (the expression in the syllabus of the case, "balance of unpaid *purchase-money*," seems incorrect); nor does he have to restore what he has received under the invalid contract, but he may credit this against his claim for the value of the property conveyed.(o)

§ 676. An enforcement of the vendor's lien for the purchase-money is another remedy.(p) The ordinary subject-matter of the suit in *assumpsit* is the price of land sold.(q) In a Canada case it was said: "The price of land sold when the conveyances have been executed, and when all that remains to be settled for is the price of the land, may be recovered under the common counts for lands sold and conveyed. I see no reason why the like count might not be sustained by the mortgagor against the mortgagee, or by the assignor of a mortgage against the assignee of it, if, after the execution of the mortgage or assignment, the mortgagee or assignee refused to pay the consideration-money."(r)

In the case of an exchange of land an *assumpsit* has been held to lie for the value of one tract conveyed by the plaintiff under the contract.(s) Where deeds are delivered under an informal voluntary partition, the owelty, as we have seen, can be recovered in *assumpsit*.(t) An action for use and occupation will lie when the defendant has taken possession under an oral lease, the Statute of Frauds being no bar.(u) Nor is the statute a defence to an action of *indebitatus assumpsit* brought for rents and profits of land actually received, the plaintiff having fulfilled his part of the agreement.(v)

Although in Kentucky no rent can be recovered even on an exe-

(o) *Thomas v. Dickinson*, 14 Barb. 90.

(p) *Hilton v. Duncan*, 1 Coldw. 313; *Briscoe v. Bronaugh*, 1 Tex. 330; *Shennan v. Paraill*, 18 Grant, Ch. 10; *Taylor v. Knowles*, 30 U. C. Q. B. 200; *Campbell v. Campbell*, 3 Stockt. 268 (a case of partition). See *supra*.

(q) *Basford v. Pearson*, 9 Allen, 390, cit-

ing cases; *Horbach v. Gray*, 8 Watts, 497.

(r) *Carscaden v. Shore*, 17 U. C. C. P. 497.

(s) *Bassett v. Bassett*, 55 Me. 130.

(t) *Baxter v. Gay*, 14 Conn. 119.

(u) *Sims v. Porter*, Tapp. 77.

(v) *Rogers v. Tracey*, 1 Root, 233, citing *Clark v. Brown*, Id. 78.

cuted contract of lease within the Statute of Frauds, yet an action for use and occupation will lie, and the lease is admissible to prove damages.(w) The assignee of a lease void (because made by a tenant for life contrary to the terms of the gift of the life estate) who has occupied to the end of his term and paid the rent reserved, is liable in *assumpsit* on an implied promise to keep the premises in repair, as required by covenant in the original lease.(x)

Where a tenant repaired under the defendant's promise to give him an assignment of a lease, and when he sued on the special contract and for work, and labor, and on the money counts, was met by the defence of the Statute of Frauds; said Best, C. J.: "The objection is a most dishonest one; but, if legal, must prevail. The fourth section of the statute is decisive against the plaintiff on the special count, but I think the plaintiff entitled to a verdict on the others. The plaintiff has expended this money for the benefit and at the instance of the defendant; the law will therefore imply a promise not touched by the statute, nor within the danger of perjury guarded against by it; the agreement is executed on the part of the plaintiff, and the defendant is legally liable to remunerate him for what he has done."(y) *Indebitatus assumpsit* will lie for the price when a deed of land has been received.(z)

§ 677. Where one side of a contract within the "Year" clause of the Statute of Frauds has been performed, a *quantum meruit* lies to recover compensation when the other side is not enforceable.(a) Where a contract for the sale of growing crops is taken out of the Statute of Frauds by the vendee taking part of the crops and turning it into money, an action for money had and received, though not one for goods sold and delivered, will lie.(b) On a demurrer the word "executed" in the plaintiff's averment will be taken to imply a complete fulfillment of the Statute of Frauds.(c)

Year
clause; the
pleading
generally.

(w) *Morehead v. Watkyns*, 5 B. Mon. 229.

(x) *Beale v. Sanders*, 5 Scott, 58.

(y) *Gray v. Hill, Ry. & Mood*. 420.

(z) *Wolfe v. Hanver*, 1 Gill, 92.

(a) *Broadwell v. Getman*, 2 Denio, 87; *Pitkin v. Long Island R. R.*, 2 Barb. Ch. 221; *Quackenbush v. Ehle*, 5 Barb. 469; *Davenport v. Gentry*, 9 B. Mon.

427; *Pierce v. Paine*, 28 Vt. 37; *Emery v. Smith*, 46 N. H. 151; *Marcy v. Marcy*, 9 Allen, 8; *Wilson v. Ray*, 13 Ind. 1. This is rather a point of part performance than of full performance; and see further "Year."

(b) *Hollins v. Morris*, 2 Harring. 3.

(c) *Shank v. Teeple*, 33 Ia. 192.

CHAPTER XXXI.

VALIDITY.

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| <p>§ 678. Oral contract within the Statute of Frauds is voidable; not void.</p> <p>§ 679. How far held void. How far such a contract is a valuable consideration.</p> <p>§ 680. Exceptions to rule that oral promise is not a consideration. Account stated; I. O. U.; oral sale of land voluntarily performed, &c.</p> <p>§ 681. Statute of Frauds applies in equity; exceptions generally. Rule as to costs. The statute in a justice's court.</p> <p>§ 682. No action will lie on the oral contract. Or indirect effect given thereto. Oral promise to give writing, invalid.</p> <p>§ 683. Examples of rule that no indi-</p> | <p>rect effect will be given to oral contract.</p> <p>§ 684. No change in form of action will avail. No liability for fraud for breach of contract. No liability in a collateral action.</p> <p>§ 685. Oral contract in line of title. Examples of oral evidence admitted to explain extrinsic matters.</p> <p>§ 686. Perjury and forgery. Perjury.</p> <p>§ 687. Forgery.</p> <p>§ 688. The Statute of Frauds in relation to other laws.</p> <p>§ 689. The State how far bound by the Statute of Frauds. How far attorneys' agreements within the statute.</p> <p>§ 690. Miscellaneous points.</p> |
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§ 678. IN the chapters on Voluntary Performance and on the Severability of Contracts and on Pleading, the question how far an oral agreement within the Statute of Frauds might to some extent or under some circumstances be enforceable, is discussed in certain of its bearings. The general subject, however, calls for consideration as a separate point. It may be said that an oral contract within the Statute of Frauds is not illegal or void,^(a) but is only voidable or non-enforce-

Oral contract within the Statute of Frauds is voidable; not void.

(a) *Kaufman v. Stone*, 25 Ark. 346; *Shaw v. Shaw*, 6 Vt. 75; *Hawley v. Robson v. Harwell*, 6 Ga. 596; *Rowland v. Bull*, 5 B. Mon. 149; *Brown v. Frantum*, 6 La. 46; *Lane v. Shackford*, 5 N. H. 132; *Minns v. Morse*, 15 Ohio, 571; *Hamilton v. Gilbert*, 2 Heisk. 681; *Roberts v. Francis*, 2 Heisk. 133; *Crutchfield v. Donathon*, 49 Tex. 694; *Moody*, 24 Vt. 605; *Child v. Pearl*, 43 Vt. 224; *Montgomery v. Edwards*, 46 Vt. 153; *Strong v. Dodds*, 47 Vt. 354; *Brittain v. Rossiter*, 48 L. J. Exch. 362, 27 W. R. 482, denying *dicta* to the contrary in *Carrington v. Roots*, 2 M. & W. 254, and *Reade v. Lamb*, 6 Exch. 130;

able. Such contracts have been likened to *nuda pacta*.(b) The lack of a writing is merely matter of evidence.(c)

It has been said that the oral agreement is valid but not enforceable.(d) The phraseology of the Statute of Frauds is not without importance in this relation; in speaking of the Iowa statute the Supreme Court of that State has said: "The language of the statute is: 'Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent unless it be in writing and signed by the party charged, or by his lawfully authorized agent;' Rev., 4006. And it is specifically declared in the statute itself (4009), 'that the regulations therein provided relate merely to the proof of contracts.' Our Statute of Frauds, in this respect, is unlike the statute of 29 Charles II., which declared that certain contracts enumerated should not be allowed to be good, and in respect to certain others that no action shall be brought thereon."(e)

The difference just referred to between the fourth and seventeenth sections of the 29 Car. II. c. 3, has been adverted to in a number of cases, but it is not of much consequence.(f) Though, as will be seen elsewhere, it has been suggested in England that under the language of the seventeenth section there is no contract till the statute is complied with, while it seems to be otherwise under the fourth.(g)

§ 679. In Indiana a contract within the statute has been held to be void.(h) So in North Carolina;(i) it seems to be so in Michigan.(j) The object of the Statute of Frauds was to protect one party against the fraud of the other as to

How far
held void;
how far such
a contract is

McClellan v. Nicholls, 7 Jur. N. S. 999; 4 L. T. N. S. 863. See Wood, Mast. & Serv., § 187, p. 357.

(b) Henderson v. Hudson, 1 Munf. 515.

(c) Child v. Pearl, 43 Vt. 224. See "Pleading."

(d) Bird v. Munroe, 66 Me. 341, citing cases.

(e) Berryhill v. Jones, 35 Ia. 339; Westheimer v. Peacock, 2 Ia. 531.

(f) Townsend v. Hargraves, 118 Mass. 334 ("It is true that there is a difference in phraseology in these two sec-

tions; but in view of the policy of the enactment and the necessity to give consistency to all the parts, the difference cannot be held to change the force and effect of the two sections"); Bird v. Munroe, 66 Me. 343; see Fricker v. Tomlinson, 1 M. & G. 772.

(g) Williams v. Wheeler, 8 C. B. N. S. 299; see Noble v. Ward, L. R. 1 Exch. 121. See "Memorandum."

(h) Ferguson v. Ramsey, 41 Ind. 512.

(i) Gulley v. Macy, 84 N. Car. 441.

(j) Scott v. Bush, 26 Mich. 421.

a valuable
considera-
tion.

an alleged contract; it was not like the other Statute of Frauds sometimes so called, that namely of Elizabeth, passed in the interest of creditors.^(k)

A more difficult question arises when we try to determine whether an oral promise within the Statute of Frauds is a good consideration for a subsequent express promise. On the broad question the weight of authority appears to be that it is not.^(l) Where the defendant, in consideration of a deed of land being made by the plaintiff to a certain third person, promised to give the plaintiff a certain promissory note, and the plaintiff executed and tendered the deed; the defendant is not liable for not signing the note, his promise having no consideration; the plaintiff's promise being not evidenced by a writing,^(m) even when the later promise is evidenced by a promissory note.⁽ⁿ⁾ So a promise to pay money to be released from a contract within the statute is without consideration.^(o)

A promise to release the promisee from liability cannot be enforced when in consideration of an oral guaranty of the liability of a third person.^(p) An oral guaranty of a debt is not consideration for a promise to waive a lien for the debt.^(q) A promise referring to a previous oral guaranty, if treated as a present engagement to pay an anterior debt owing by the promisor, is without consideration if such previous debt was an oral guaranty.^(r) A note given by a member of a vestry for a debt of the church is a mere guaranty, and is without consideration.^(s)

The assignment of an invalid oral contract with third parties is no consideration for a promise.^(t) On the other hand, it has been

(k) *Snyder v. Martin*, 17 W. Va. 302.

(l) *Thomas v. Trustees of Harrodsburg*, 3 Marsh. 299; the plaintiffs sued for the price of land, but had signed no memorandum and had not conveyed, and for want of mutuality could not recover. *Farnham v. O'Brien*, 22 Me. 482; the suit was by the lessee under an oral promise against the lessor for losses through part performance and for loss of profits.

(m) *Liddle v. Needham*, 39 Michigan, 148.

(n) *Hooker v. Knab*, 26 Wis. 513.

citing cases; *Krohn v. Bantz*, 68 Ind. 277, citing cases.

(o) *Silvernail v. Cole*, 12 Barb. 686; *North v. Forest*, 15 Conn. 406. But *secus* where the contract within the statute was evidenced by a writing which the court was inclined to think sufficient; *Haigh v. Brooks*, 10 A. & Ell. 319; *Brooks v. Haigh*, Id. 334.

(p) *Evans v. Lohr*, 3 Ill. 514.

(q) *Danforth v. Pratt*, 42 Me. 52.

(r) *Hall v. Soule*, 11 Mich. 494.

(s) *Rogers v. Waters*, 2 G. & Johns. 70.

(t) *Mayer v. Child*, 47 Cal. 144.

held that oral evidence is admissible to prove the consideration of a promissory note, though that consideration was a verbal sale of land, and though without some extrinsic proof of consideration such a note was not valid.^(u) So an oral exchange of land may be a good consideration for a check; and this though the maker of the check refused to carry out the bargain.^(v) A guaranty may be a consideration for a note so as to bring the latter within 3 Anne, c. 9; and the promise in the note being absolute, the note is negotiable.^(w)

In a case in Cowper, Lord Mansfield said that a promise within the Statute of Frauds was sufficiently supported by the moral obligation; but to make this rule sound it must be so limited as to leave it of little utility, &c. It is true that an oral contract voluntarily performed will not be disturbed; it is also true that a subsequent memorandum of the contract is sufficient to satisfy the statute, and the moral obligation is an additional reason for this. But of itself the oral contract is worth nothing as a moral obligation.

§ 680. Assuming that it is impossible to reconcile *Edgerton v. Edgerton* and *Raubitschek v. Blank* with the rule that the promise within the Statute of Frauds is no consideration for another later promise; there are some cases that can be excepted from this rule. Thus an account stated, being in the nature of an execution of the contract, may receive support from a previous invalid oral contract;^(x) or even perhaps an I. O. U. for the same reason.^(y)

Exceptions to rule that oral promise is not a consideration; accounts stated; I. O. U.; oral sale of land voluntarily performed, &c.

Another exception is where a vendor of land by oral sale and not bound to convey can do so, and hold the vendee on a note for the price; and in a Texas case it was said that where the action is "brought upon a promissory note given by the vendee, although it may not be such a memorandum as satisfies the statute,

^(u) *Edgerton v. Edgerton*, 8 Conn. 10; the court taking the ground that the promise being in writing was a sufficient compliance with the Statute of Frauds, and that in Connecticut the rule of *Wain v. Warlters* did not apply; *semble*, no conveyance of the land need be proved.

^(v) *Raubitschek v. Blank*, 80 N. Y. 479; 44 N. Y. Super. 564; the court

held that the check imported consideration, and the burden of disproving this was on the defendant; and there was another writing which with the check satisfied the Statute of Frauds.

^(w) *Poplewell v. Wilson*, 1 Stra. 264.

^(x) *McCoy v. Williams*, 6 Ill. 589.

^(y) *O'Sullivan v. O'Callaghan*, 2 Ir. Jur. 314.

the maker 'cannot avoid the note which he has given, because he has omitted to bind the vendor.' The cause of action in this case is a promissory note reciting its consideration, and, as the action is brought upon the note, and not upon the contract of sale, it is no valid defence to plead that the sale of the lot in consideration for which the note was given was not evidenced by any writing, as required by the statute."^(z) So a defence that a bond in suit was in consideration of a verbal sale of land is not sufficient; the plea did not aver any agreement to convey by the vendor, but only alleged that there had been no tender of conveyance.^(a)

So where in answer to a suit for dower, the defendant set up a deed from husband and wife, and offered, as showing consideration for the wife's renunciation of her dower, his promise to buy in the land at sheriff's sale and let the husband redeem on more favorable terms than the law would have given; it was held that the verbal promise was good consideration for the renunciation of dower; the defendant bought in the land, but no offer of redemption was made by the husband.^(b) This last case, which was on both sides for an interest in land, may be supported rather by the fact that the oral contract was used as a defence merely by one who had moreover performed all his part of the agreement. Another exception is where the defendant, having promised, is not able to perform because a third person, whose interposition is essential, falls back upon the Statute of Frauds; here the defendant is in default, and the connection of the oral contract with his promise is an accidental or collateral one.^(c)

§ 681. The Statute of Frauds applies as well in equity as at law;^(d) subject to the exceptions, however, of part performance, and the admission of the contract by the defendant in his pleadings.^(e) In one of the *Vesey*s it was said that the courts of equity go further than courts of law in allowing recovery notwithstanding

(a) *Crutchfield v. Donathon*, 49 Tex. 694; see *Rhodes v. Storr*, 7 Ala. 347; *McGowen v. West*, 7 Mo. 569; *Gillespie v. Battle*, 15 Ala. 276.

(a) *Prewett v. Vaughan*, 21 Ark. 419.

(b) *Bailey v. Litten*, 52 Ala. 283.

(c) *Thomas v. Dickinson*, 14 Barb. 93; *Porter v. Dearing*, 33 Ind. 156.

(d) *Allen v. Bennet*, 3 Taunt. 175; *Caton v. Caton*, L. R. 1 Ch. App. 146; 35 L. J. Ch. 292, see Table of Cases; *Wilson v. Watts*, 9 Md. 460; *McCoy v. Hughes*, 1 G. Greene, 373.

(e) *Child v. Comber*, 3 Swanst. 426; *Burnard v. Nerot*, 1 C. & P. 580.

ing the Statute of Frauds; but not further as to what is a sufficient memorandum.^(f) A court of equity does not remunerate in damages for the breach of a contract within the Statute of Frauds.^(g) It has been held that the Federal law which requires the assignment of a patent to an invention to be in writing applies only to the legal title, and not to an equitable interest or a mere right to an account.^(h)

Courts of equity reserve to themselves one further exception to the strict rule of the Statute of Frauds, and give or refuse costs as they think that the defence of the statute has worked hardship and unnecessary expense to the other party or not.⁽ⁱ⁾ The Statute of Frauds applies in a justice's court.^(j)

§ 682. In spite of the many exceptions made to the Statute of Frauds, the rule of law is that no action will lie upon an oral contract within the statute,^(k) or any indirect effect be given thereto.^(l) In a Vermont case the court said: "We do not apprehend that the meaning of the statute is that the action must be such, to bring the case within the statute, that the contract must necessarily be set out in the declaration, but that it applies to cases where the action is brought substantially to enforce rights dependent upon or resulting from the contract."^(m) An oral promise to make the writing required by the Statute of Frauds is itself within the latter.⁽ⁿ⁾

statute in a justice's court.

No action will lie on the oral contract; or indirect effect given thereto; oral promise to give writing, invalid.

Where there was an oral promise upon the payment of a certain

(f) *Morison v. Turnour*, 18 Ves. 175.

(g) *Lawrence v. Smith*, 27 How. Pr. 327.

(h) *Blakeney v. Goode*, 30 Ohio St. 354, citing *Somerby v. Buntin*, 118 Mass. 285.

(i) *Cowell v. Watts*, 2 H. & Tw. 229; 19 L. J. Ch. 455; *Christie v. Dowker*, 10 Grant, Ch. 200; *Stretton v. Stretton*, 24 id. 20. See *Stern v. Drinker*, 2 E. D. Smith, 406.

(j) *McKeen v. Brown*, Stev. N. B. Dig. 682.

(k) *Carmack v. Masterson*, 3 Stew. & Port. 412; *Hibbard v. Whitney*, 13 Vt. 23; *Davis v. Moore*, 9 Rich. 215; *Albee v. Griffin*, 2 Dev. & Bat. Eq. 9; *Dunn v.*

Moore, 3 Ired. Eq. 364; *McC Campbell v. McC Campbell*, 5 Litt. 92; *Baker v. Jameson*, 2 J. J. Marsh. 547; *Thomas v. Dickinson*, 14 Barb. 93.

(l) *Dung v. Parker*, 52 N. Y. 496.

(m) *Buck v. Pickwell*, 27 Vt. 168, citing *Scorell v. Boxall*, 1 Y. & J. 396.

(n) *Amburger v. Marvin*, 4 E. D. Smith, 393; *Box v. Stamford*, 13 Sm. & M. 93; *Pulse v. Hamer*, 8 Oregon Rep. 254; *Ledford v. Ferrill*, 12 Ired. 285; *Yates v. Martin*, 2 Pinn. (Wis.) 171; *Smith v. Bowler*, 2 Disney, 156, Superior Ct. of Cincinnati, affirmed S. C. 1 id. 520; *Hayes v. Burkham*, 51 Ind. 136; *Mobile Ins. Co. v. McMillen*, 31 Ala. 719.

sum to sign a written offer of the sale of land, the Supreme Court of Wisconsin held that the Statute of Frauds applied; one judge dissenting, thought that the writing, being a mere offer, would not if given have passed any interest in the land, and that therefore the promise to make such an offer was not within the statute.(o) Where the plaintiff bought property at sheriff's sale, and there was a mistake in the sheriff's memorandum and in his deed, an oral promise by the execution defendant to give another deed rectifying the error is invalid, and a bill to compel the correction dismissed.(p) It has been suggested, however, that the violation of a promise to give the writing might be such fraud as would take the case out of the Statute of Frauds. In a Missouri case it was said that a fraudulent refusal to give the writing, if the promise was not to do the act which was within the statute, but expressly to give the writing, would lay ground for an enforcement of the contract;(q) a distinction which has probably no solid basis at all.

In a case in the Mississippi Chancery it was said that "An acknowledged exception to the statute is where the agreement is intended to be reduced to writing according to the statute, but is prevented by the fraud of one of the parties. And I so apprehended the rule would be where, as in this case, the contract was written out and one of the parties promised to sign it, but was prevented by inevitable accident."(r) In defence to a bill praying to be relieved upon an agreement touching an assignment of a lease and goods, the defendant pleaded the Statute of Frauds, but the Court of Chancery in an English case, upon the plaintiff saying that it was agreed that the contract should be put into writing, ordered the defendant to make an answer to this, and saved the demurrer and plea for the hearing.(s)

§ 683. The following are examples of the invalidity of oral contracts under the Statute of Frauds, even where the introduction of the verbal evidence is more or less indirect. Thus, a parol admission of receipt of goods

Examples
of rule that
no indirect

(o) *Yates v. Martin*, 2 Pinn. (Wis.) Ch. (Miss.) 68, citing *New. on Con.* c. 10, 177. p. 179 *et seq.*; 2 Story, Eq. 79.

(p) *Butcher v. Buchanan*, 17 Ia. 81.

(q) *Wooldridge v. Scott*, 69 Mo. 673.

(r) *Finucane v. Kearney*, 1 Freem.

(s) *Leake v. Morris*, 1 Dick. Ch. 14; see *Hollis v. Whiteing*, 1 Vern. 151; *S. C. sub nom. Hollis v. Edwards*, Id. 159; see *Deane v. Izard*, 1 Vern. 159.

does not lay ground for an action, because the contract under which they were delivered must be in writing to be valid by the Statute of Frauds.^(t) So parol declarations have no effect to divest the title to land.^(u) Even in an action for the breach of a written contract to give the refusal of land, the defendant, in order to show that he had not sold against the plaintiff's wishes to a third person, cannot ask the latter what interest he bought, if the plaintiff objects to this as oral proof of a sale of land; the witness under objection said that he had bought the defendant's interest, whatever it might be.^(v)

effect will be
given to oral
contract.

An independent invalid oral contract as to land cannot be proved under the pretence of showing the consideration of a deed.^(w) A written promise by a married woman to buy land is invalid because of her coverture, nor can it be ratified under the Statute of Frauds by an oral promise after she becomes discoverd.^(x) An oral promise for a valuable consideration by the payee of a note to give an extension of time to one maker will not discharge the other maker, since by the law of Vermont such a promise must be in writing.^(y)

Where the defendant being in debt to the plaintiff, one H. agreed to give the plaintiff a note for the amount if the defendant would convey him certain land; H. gave the note, but the defendant did not convey him the land. The plaintiff, alleging that H. was insolvent, and the note worthless unless the defendant conveyed H. the land, sought to enforce the promise to convey; but a demurrer to his complaint was sustained.^(z) An oral sale of land is of no validity to prevent the land escheating as the property of the seller.^(a) A vendee of chattels under an oral interest has been held to have no insurable interest.^(b)

The defendant, who has signed no memorandum under the statute, is not liable even for a stipulated penalty for not fulfilling his contract.^(c) But actual payment of the money will be good. Thus, a deposit of money as a pledge for the performance of an oral con-

(t) *Northrup v. Jackson*, 13 Wend. 86.

(y) *Benedict v. Cox*, 52 Vt. 250.

(u) *Jackson v. Cary*, 16 Johns. 302;
or to a slave, *Gamble v. Gamble*, 11 Ala.
976.

(s) *Porter v. Dearing*, 33 Ind. 156.

(a) *Sebben v. Trezevant*, 3 Des. 217.

(b) *Stockdale v. Dunlop*, 6 M. & W.

(v) *Lecroy v. Wiggins*, 31 Ala. 19. 232.

(w) *Howe v. Walker*, 4 Gray, 318.

(c) *Edwards v. Kelly*, 8 Jones, Law,

(z) *Chaney v. Flynn*, 2 Kentucky 70.

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tract invalid under the Statute of Frauds, made to the obligee of the contract, can be recovered by the latter when taken away by fraud, and the holder decreed to hold in trust for such obligee; in the particular case a married woman.(d)

§ 684. No change in the form of action will accomplish an evasion of the law; a suit for damages is unavailing.(e)
 No action of damages will lie for discharge from service during the year where, it having been agreed that the year's service should begin at a future date, the Statute of Frauds applied.(f) If, because of the Statute of Frauds, specific enforcement of an oral contract relating to land is refused, an injunction to protect the donee's possession will also be refused.(g) An action on the case will not lie for breach of faith in not performing an oral contract within the Statute of Frauds.(h)

Where a writing was held insufficient as a compliance with the Statute of Frauds, a count in the declaration that the defendant fraudulently concealed the fact of the execution of such writing falls under the statute with the rest of the plaintiff's case.(i) Where the defendant, assuming to act as agent for the owners of land, verbally agreed to lease it to the plaintiff for seven years, and when the owner denied his authority, reasserted the latter and advised the plaintiff to stand suit, he is not liable for the latter's costs in defending an ejectment, as, under the oral agreement, the plaintiff was only a tenant at will.(j) That the promisee parts with things of value in reliance that the promisor would sign a memorandum of guaranty, does make a breach of the oral contract, fraud.(k)

The suppression of the fact of the existence of a verbal agreement for the sale of lands was held under certain circumstances to be no fraud, though a purchaser in writing about the land said: "I have not entered into any contract, he having verbally agreed

(d) *Hales v. VanBerchem*, 2 Vern. 619.

(e) *Marionneaux v. Edwards*, 4 La. Ann. 103, citing cases; *Culligan v. Wingerter*, 57 Mo. 242.

(f) *Blanck v. Little*, 10 Reporter, 151; 9 Daly, 268; *Harper v. Davis*, 1 Can. Law Times, 49; 45 U. C. Q. B. 442.

(g) *Ridley v. McNairy*, 2 Humphr. 177, citing cases.

(h) *Davis v. Moore*, 9 Rich. Law, 219; *Irving v. Merrygold*, 3 U. C. Q. B. 273; see *Dolman v. Nokes*, 22 Beav. 402.

(i) *Archbold v. Lord Howth*, 1 Ir. Rep. C. L. 619; 18 Ir. Jur. 88.

(j) *Pow v. Davis*, 30 L. J. Q. B. 259.

(k) *Hayes v. Burkam*, 51 Ind. 136.

to sell the land at an advance.”(l) A late New York case has allowed a recovery for fraud in not fulfilling an oral contract within the statute. The plaintiff had agreed by parol to buy and one S. to sell him certain chattels, and both would have fulfilled their contract, but the defendant sending S. a telegram so signed as to make S. believe it came from the plaintiff, which telegram stated that the plaintiff did not want the articles, and that S. might sell them to another, and defendant then buying the articles of S.; it was held that the defendant was liable in an action for the fraud, notwithstanding the contract between S. and plaintiff was within the Statute of Frauds.(m) The point of distinction in this case is the fact of the readiness of S. and the plaintiff to perform, which, being treated as equivalent to actual performance as to third parties, took the contract out of the statute.

Where the plaintiff goes to expense in reliance upon an oral contract within the Statute of Frauds, made by one who fraudulently represented himself to be the agent of a certain principal; the alleged agent was not liable even in tort, because if he had been agent the oral contract would have been equally invalid.(n)

As further examples of the non-liability to a collateral action of the parties in a contract within the Statute of Frauds there are the following: A modern English case held that a certain act of 1867 (30 & 31 Vict. c. 141) applied only to cases of contract which are within the meaning of certain previous acts mentioned in the schedule. By the terms of an act mentioned in such schedule, *i. e.*, 4 Geo. IV. c. 34, § 2, contracts of service must be in writing to bind, unless service is actually taken; and it was held that under the act of 1867 no action could be had because of a refusal to take service under an oral promise to do so. And Mellor, J., said that criminal proceedings cannot be had against one for not entering into service of master where the contract was one which could not have been enforced civilly, because of the Year clause of the Statute of Frauds, being for a year to begin at a future date.(o) It seems that an oral

(l) *Dolman v. Nokes*, 22 Beav. 402.

Wend. 385, was not overruled but was followed.

(m) *Rice v. Manley*, 66 N. Y. 83; 2 Hun, 492; distinguishing *Dung v. Parker* as a case where there was no evidence that the other party was willing to perform, and saying that *Benton v. Pratt*, 2

(n) *Dung v. Parker*, 52 N. Y. 491.

(o) *Banks v. Crossland*, L. R. 10 Q. B. 101; 44 L. J. Mag. Cas. 8; 11 Moak, 172 (n.)

contract of hiring within the Statute of Frauds will be ineffective to give a settlement.(p) A telegraph company is not liable in damages for failure to send certain telegrams which, if sent, would not have bound the sender under the Statute of Frauds.(q) Where a writing is necessary to pass title in chattels, the true owner may take back the chattels under a search-warrant; and the vendee cannot complain that a trespass was committed because the warrant was not supported by a proper affidavit.(r)

§ 685. An oral invalid contract anywhere in the line of title, vitiates the latter; and in an action brought to recover a chattel, if the evidence introduced by the plaintiff to establish his title showed that the title depended upon a verbal contract within the Statute of Frauds, the courts ought to instruct the jury to disregard such evidence.(s) If a writing is necessary to pass the right to the thing in demand, &c., a submission and award must be in writing.(t) That a defendant has conveyed to a *bonâ fide* purchaser without notice does not avail, as he had no title to convey.(u)

The following are a few examples of the admission of an oral contract to explain some extrinsic matter. Thus, where the law required the contract for the sale of a slave to be in writing, an oral contract is admissible to show the circumstances under which the slave had been delivered; the latter absconded, and it was a question who was to bear the loss.(v) In a Nevada case an invalid oral contract within the Statute of Frauds was allowed to be proved in order to show how the defendant in replevin had obtained possession of certain sheep the subject of the suit; this, it seems, with a view to the question of damage.(w)

In a suit to annul the sale of land the plaintiff can prove by parol that the defendant had parted with the title to the land, as showing that he could not carry out the contract.(x) On a suit on a written promise to pay for the use of certain land, writings given as leases but not executed so as to pass any title are admissible on

(p) *Bracegirdle v. Heald*, 1 B. & Ald. 722.

(q) *Kinghorne v. Montreal Teleg. Co.*, 18 U. C. Q. B. 66.

(r) *Reed v. Lucas*, 42 Tex. 534.

(s) *Summerall v. Thoma*, 3 Fla. 305.

(t) *French v. New*, 28 N. Y. 147, citing cases.

(u) *Cave v. Mackenzie*, 46 L. J. Ch. 565; 37 L. T. N. S. 218.

(v) *Nicholls v. Roland*, 11 Mart. 190.

(w) *Buckley v. Buckley*, 9 Nev. 381.

(x) *Burbank v. Pierces*, 26 La. Ann. 295.

behalf of the plaintiff to show how the defendant held the land.(y)

An invalid oral promise to take back bank-bills given in payment, and within the seventeenth section of the Statute of Frauds, is admissible to show that there was no agreement by the seller in the original transaction that, contrary to the ordinary rule, he should assume the risks of the bills.(z) And where there is a written promise to pay debt of third party upon his default, a parol guaranty to the same effect is admissible in evidence as proving not the promise itself, which would violate the Statute of Frauds, but as an admission by the defendant that there had been a default on the part of a third party.(a) Where a memorandum of the sale of goods was insufficient under the Statute of Frauds, it was admitted as corroborative of the oral evidence, the latter being allowed because of a part payment made.(b)

The effect of voluntary performance, part performance, the severability of the contract, the use of the oral agreement as a defence, and of the admissions in pleading, are treated of elsewhere in chapters devoted to those subjects.

§ 686. While the question is not on authority free from doubt, it is probably the law that false swearing to an oral contract within the Statute of Frauds constitutes perjury. Thus, where a defendant by his answer sets up facts in parol by which the enforcement of a written contract within the Statute of Frauds is sought to be avoided on the ground of fraud, such evidence is material and admissible, and if perjured the party is liable to indictment.(c) It seems that it is perjury for a defendant in equity to deny in his answer an oral agreement by which certain leaseholds were orally excepted from a writing.(d) A defendant in such a case should, it would seem, either plead the Statute of Frauds, or in his answer admit the agreement and yet claim the benefit of the statute; see, however, *Rex v. Dunston*, *infra*.

Where a defendant in equity denied the trust alleged in the plaintiff, he was afterwards, upon the plaintiff's testimony cor-

(y) *Cornwall v. Hoyt*, 7 Conn. 428.

(z) *Houghton v. Adams*, 18 Barb. 548.

(a) *Harbert v. Skinner*, 37 Ia. 209.

(b) *Newby v. Rogers*, 40 Ind. 11.

(c) *Regina v. Yates*, Car. & M. 135,

distinguishing *Rex v. Benesec* as a case

where the bill was to enforce a contract within the Statute of Frauds, and to

which the latter was a complete answer.

(d) *Fell v. Chamberlain*, 2 Dick. 484.

roborated by circumstances, convicted of perjury; in the original proceeding the Lord Keeper Henley had refused, on the ground of the Statute of Frauds, to receive oral evidence of the trust.^(e) The American law is to the same effect as the English; and it is perjury to swear falsely to an oral contract within the Statute of Frauds, and it is slander to impute such false swearing.^(f) A witness permitted to testify as to a material fact is indictable for perjury, though his evidence was incompetent and against the policy of the law.^(g)

On the other hand, it has been held that such swearing does not make one liable for perjury, and it has been said that an indictment will not lie for falsely swearing to a parol promise within the Statute of Frauds, the promise being absolutely void. The defendant had in an answer in equity denied the oral promise and set up the Statute of Frauds; for this he was indicted.^(h) So where in an answer in equity the defendant set up the Statute of Frauds and also denied the existence of the oral agreement, he cannot be indicted for perjury if the latter assertion was willfully false; because, the Statute of Frauds being set up, the fact is immaterial.⁽ⁱ⁾

These rulings may be reconciled with *Regina v. Yates* by the distinction that a *denial* even in an answer in equity is only a mode of pleading, and not strictly testimony; in *Regina v. Yates* the facts falsely sworn to were positive assertions, and being stated in an answer were testimony rather than mere pleadings. A Lower Canada decision, to the effect that where a deposition was taken without the written consent required by law no indictment for perjury thereon will lie, is based upon the consideration that the deposition so taken was not legal evidence.^(j)

§ 687. The law as to the forgery of an insufficient writing under the Statute of Frauds differs from that as to perjury. Forgery. The simulation of such an instrument is not forgery. Thus upon an indictment for the forgery of an assignment of lease,

(e) *Bartlett v. Pickersgill*, 1 Eden, 517.

(f) *Howard v. Sexton*, 4 Comstock, 157.

(g) *Chamberlain v. People*, 23 N. Y. 85; and on the subject generally of false swearing to matters within the Statute of Frauds, see Archb. Crim. Prac. and Pl. (8th Am. ed.) p. 1730, p. *597.

(h) *Rex v. Benesech, Peake*, Add. Cas. 93; see *Rex v. Dunston*.

(i) *Rex v. Dunston, Ry. & Moo.* 109; *Bartlett v. Pickersgill* being distinguished as a case where it did not appear whether the Statute of Frauds had been pleaded and relied on.

(j) *Queen v. Martin*, 21 L. C. Jur. 156.

where the *postea* did not show the signature (mark) of the assignor, Holt, C. J., said: "If the indictment had been forging a deed of assignment, and the fact had been set forth without any mark or signing, that might have been good, because signing is not necessary to a deed; for in former times they were only sealed and not signed; but now since the Statute of Frauds, &c., an assignment by writing if it is no deed, yet it must be signed, and this being no more it ought to have been signed."*(k)* So where a promissory note altered in amount was also altered by having the name cut out and in this condition was uttered, the utterer was not liable criminally, because the note was valueless for want of signature *(l)*

Forgery of a will invalid under the Statute of Frauds is not indictable; and it not appearing whether the property conveyed was freehold, so as to require a will attested properly under the statute, or a chattel interest, the court would presume it a freehold.*(m)* So in America.*(n)* Thus, where an indictment for forgery shows the instrument forged to be a mere nullity (as showing no consideration) and does not aver how it can be made to act injuriously, it was held that the indictment is insufficient; citing many cases.*(o)* But that the forgery of an endorsement on an unstamped note is a crime, the stamp being merely a requirement of the revenue laws.*(p)* So in Missouri, a conviction for forgery was sustained, though the instrument simulated professed to be the act of a municipality which had no power to make such an obligation.*(q)*

In a New York case it was said that under an act making it criminal to obtain one's signature to a writing by false pretences, it is sufficient that the writing is not void on its face, so as to be entirely worthless.*(r)*

(k) Queen v. Goddard, 3 Salk. 171; is contrary to general law; and cites S. C. 2 Ld. Raym. 920.

(l) Rex v. Pateman, R. & B. C. C. 455.

(m) Rex v. Wall, 2 East, P. C. 953.

(n) State v. Humphreys, 10 Humph. 444; Howard v. Sexton, 4 N. Y. 157.

(o) People v. Tomlinson, 35 Cal. 506.

(p) People v. Frank, 28 Cal. 514, citing English cases.

(q) State v. Eades, 68 Mo. 150, 3 Amer. Crim. Law Rep. (Hawley) 123 and n. Hawley's note says that such a rule must be under Missouri statute, and

is contrary to general law; and cites Wharton and Bishop.

(r) People v. Crissie, 4 Denio, 528.

Generally as to the forgery of an invalid instrument; see Waterman's Crim. Dig. 198 *et seq.*; 1 Ben. & Heard's Mass. Dig. 710; 1 With. & Stiles' Ia. Dig. 308, 357; 2 King's Tenn. Dig. 166; Colvin v. The State, 11 Ind. 361; People v. De Graff, 1 Wheel. Crim. Cas. 212; Cunningham v. People, 4 Hun, 455; Waterman v. People, 67 Ill. 91; Hawley's Amer. Crim. Rep. 225; State v. Ames,

§ 688. Where, under a local act, proprietors of lands were authorized to "contract for, sell, and convey" their lands to a canal company; such "contracts, agreements, sales, exchanges, conveyances, and assurances were to be valid to all intents and purposes; were to be enrolled with the clerk of the peace, and copies thereof to be evidence; and upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company; it was held that a conveyance of land under this act must be in writing."^(s)

The Statute of Frauds in relation to other laws.

Where a statute authorizes private roads to be laid out with the consent of the owner of the land, such assent may be orally given; this is a statutory exception to the Statute of Frauds.^(t) The latter does not apply to writings required by special statutes; an undertaking for costs of appeal need therefore not express a consideration.^(u) A memorandum of part of a contract and insufficient under the Statute of Frauds for not naming the lessor is not the less liable to an agreement stamp under 48 Geo. III. c. 149.^(v)

A paper similar to that in *Ramsbottom v. Mortley*, but signed by an auctioneer, must be stamped under 48 Geo. III. c. 14; a memorandum insufficient alone to satisfy the Statute of Frauds may have to be stamped if used to prove any portion of the contract.^(w) In another case in the same volume and page, it was said that a memorandum unsigned did not require a stamp, and being unstamped did not prevent the admission of oral evidence to the same effect.^(x)

A by-law of a corporation defendant authorizing expulsion of a member for failure to perform any contract whether verbal or written, &c., is good, and an expulsion thereunder for non-compliance of a verbal contract within the Statute of Frauds sustained.^(y) A contract for United States bonds, though within the chattel clause

2 Me. 365; *State v. Kimball*, 50 Me. 409.

^(s) *Robins v. Warwick*, 2 Bing. N. C. 483.

^(t) *Baker v. Braman*, 6 Hill (N. Y.), 48.

^(u) *Bildersee v. Aden*, 62 Barb. 179; 12 Abb. Pr. N. S. 324, citing *Thompson v. Blanchard*, 3 N. Y. 335; *Doolittle v. Dininny*, 31 N. Y. 350; *Johnson v. Ackerson*, 40 How. Pr. 222. See also *Grinestaff v. The State*, 53 Ind. 240.

^(v) *Ramsbottom v. Mortley*, 2 M. & S. 445; see *Glover v. Halkett*, 2 H. & N. 489; 26 L. J. Ex. 416.

^(w) *Rex v. Mortley*, 2 M. & S. 445.

^(x) *Ramsbottom v. Tunbridge*, 2 M. & S. 434.

^(y) *Dickenson v. Chamber of Commerce*, 29 Wis. 49, distinguishing *Hooker v. Kreab* as only deciding that a contract within the statute was not good consideration for a note.

of the New York Statute of Frauds, are, under the rules of the Stock Board of New York, enforceable as between members; the court will therefore not assume that the parties would not have complied with such rules.(z)

§ 689. The king is not bound by the Statute of Frauds: "*Roy n'est lié par aucun statute si il ne soit expressement nommé.*"(a) In a later case Lord Hardwicke expressed a doubt upon this point.(b) In Ohio it has been held that the State is bound by the Statute of Frauds, and could not compel the performance of defendant's proposition to transfer land to the State for canal purposes.(c)

The State how far bound by the Statute of Frauds; how far attorneys' agreements within the statute.

Another important exception to the Statute of Frauds is that which makes oral promises by an attorney valid. For he is bound by an engagement of guaranty, for example, if given in his character as attorney.(d) He is liable on his promise to pay the debt and costs of his client;(e) or costs alone.(f) The Statute of Frauds does not prevent a court compelling one of its attorneys to fulfill an oral guaranty relating to his case,(g) and, it seems, even the attorney of another court practising in the court in question through the medium of a side clerk.(h)

As was said in another case, the court acts to prevent misconduct in its own officer, and can punish its thieving servant.(i) An undertaking of indemnity given by an attorney to a sheriff will be enforced if clearly proved; but not if there is doubt, though the Statute of Frauds does not apply to a promise by an officer of the court.(j) Where there was an oral contract of sale of land by

(z) *Brownson v. Chapman*, 63 N.Y. 625.

(a) (*Dominus*) *Rex v. Lady Partington*, 1 Salk. 162; see *R. v. Copeland*, *Hughes*, 204, 230; 9 *Peters. Abr. (Am. ed.)* (p. 521) n.; 4 *Bac. Abr.* 200 (see *Awdley v. Halsey*, *W. Jones*, 203; *S. C. Cro. Car.* 148; *Bro. Max.* p. 69; *Maxw. Stat.* 161; *Jenk. Cent.* 807; *Morg. Max.* No. 2841.

(b) *Adlington v. Cann*, 3 *Atk.* 149.

(c) *State v. Baum*, 6 *Ohio*, 387; see *Sebben v. Trezevant*, 3 *Des.* 217.

(d) *Greaves (In re)*, cited in 1 *C. & Jer.* 374.

(e) *Senior v. Butt*, cited in 1 *Tyrw.* 283.

(f) *Payne v. Johnson*, cited in 1 *Tyrw.* 283; *Iveson v. Covington*, 1 *B. & C.* 160; see, however, *Files v. McLeod*, 14 *Ala.* 611.

(g) *Evans v. Duncan*, 1 *Tyrwh.* 284; *S. C. sub nom. Evans v. Duncombe*, 1 *C. & Jer.* 376.

(h) *Id.*

(i) *Hilliard (In re)*, 2 *D. & L.* 919.

(j) *Corbett v. O'Reilly*, 8 *U. C. Q. B.* 132.

the plaintiff to his solicitor, the defendant's testator; the terms were agreed upon, and the price to be paid at a future day with interest; and the solicitor took possession; it was held that the latter should as such have drawn up the memorandum, and specific performance was decreed notwithstanding the statute.(*k*)

Parol evidence that title to land taken by the attorney was in trust for the client, and that the attorney agreed to keep the land in discharge of notes of the client which he held, is admissible notwithstanding the Statute of Frauds, owing to the fiduciary relations between the parties.(*l*) As has been said, the evidence must be satisfactory; thus, where a mortgagee on a bill for foreclosure got a decree for an account and rested; the solicitors of the parties agreed by parol that the land be sold, the mortgage be repaid, and the residue of fund be paid the mortgagor; a bill to specifically enforce this was dismissed at the Rolls on the ground of the Statute of Frauds. The Lord Chancellor heard the evidence, but thought it insufficient to overturn the decree; it seems that he thought that the effect of the record could not be changed by parol, and that on an application to open the foreclosure proof of the parol agreement might have been given, but not in an independent proceeding to have specific enforcement.(*m*)

There do not appear to be many American authorities on the present point. In an Oregon case it was held that an oral guaranty given by an attorney in the presence of the court, and on which a certain process was discharged, was binding; but otherwise if the promise was not in the presence of the court.(*n*) In Alabama a promise by a solicitor to pay costs in a suit brought by him is a nude pact.(*o*) An engagement or representation made orally by counsel in the presence and hearing of the court will bind, though affecting the enjoyment of land, and though one which under other circumstances would have been within the Statute of Frauds.(*p*)

§ 690. It is the substance of the agreement, and not its form, which determines whether the Statute of Frauds applies.(*q*) It is

(*k*) *Brafield v. Scriven*, 22 W. R. 202. *American Tract Society*, 4 Sandford,

(*l*) *Fleming v. Duncan*, 17 Grant, Ch. 469.

79. (*o*) *Files v. McLeod*, 14 Ala. 611.

(*m*) *Cox v. Peele*, 2 Bro. C. C. 334.

(*p*) *Banks v. American Tract Society*,

(*n*) *Hedges v. Strong*, 3 Or. 18, citing 4 Sandford, 406.

Staples v. Parker, 41 Barb. 648 (a case not touching the statute), and *Banks v. Barker v. Scudder*, 56 Mo. 275, citing cases.

the circumstances of the transaction, and not mere words, which conclude the point.^(r) The Statute of Frauds does not apply, as is said elsewhere, to an implied promise or title; and where the law vests a title, no writing is necessary.^(s)

And it was suggested in a Canada case that a sale under a *fi. fa.* was not within the Statute of Frauds, there being no contract in the matter; but see "Sales."^(t) Oral evidence is admissible to show that the vendee having notice waives his right to have an unincumbered title, because the latter right being implied may be waived by parol.^(u)

(r) *Blank v. Dreher*, 25 Illinois, 333.

(t) *Haydon v. Crawford*, 3 U. C. K.

(s) *Murley v. Ennis*, 2 Colorado, B. O. S. 588.

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(u) *Ogilvie v. Foljambe*, 3 Meriv. 60.

CHAPTER XXXII.

SEVERABILITY.

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| <p>§ 691. A contract partly within Statute of Frauds is generally entirely so.</p> <p>§ 692. The singleness of the consideration.</p> <p>§ 693. General examples of the rule.</p> <p>§ 694. Inseverable contracts; land and labor contracts.</p> <p>§ 695. Land and chattels contracts.</p> <p>§ 696. Labor and chattels.</p> <p>§ 697. Guaranty and original promise.</p> | <p>§ 698. Severable contracts of guaranty.</p> <p>§ 699. The severability by making a point of time the point of division.</p> <p>§ 700. A contract relating to marriage and also to other matters; a contract not performable within a year.</p> <p>§ 701. The effect of performance.</p> <p>§ 702. Full performance.</p> <p>§ 703. Effect of part performance.</p> |
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§ 691. A PROBLEM of interest is presented by those contracts which in their terms are partly within the Statute of Frauds and partly not. As a general rule, a contract partly within the statute is wholly so.(a) In an entire contract, where the matters prior to the making of the contract were within the Statute of Frauds and those subsequent were not, the promise being to pay for goods supplied and to be supplied, the whole contract is within the statute.(b) Where, in consideration of forbearance of suit, the defendant promises to pay both rent due and that to accrue, the contract is entire and within the statute.(c)

Where there is a purchase of land by deed without covenant,

- (a) *Hobbs v. Wetherwax*, 38 How. Pr. 388; *Snyder v. Neefus*, 53 Barb. 66; *De Beerski v. Paige*, 47 Barb. 174; 36 N. Y. 539 (citing *Van Alstine v. Wimple*, 5 Cow. 163; *Mackie v. Cairnes*, Id. 548; *Thayer v. Rock*, 13 Wend. 53; *Chater v. Beckett*, 7 T. R. 204; *Crawford v. Morrell*, 8 Johns. 253); *Clancy v. Craine*, 2 Dev. Eq. 385; *Dock v. Hart*, 7 W. & S. 174; *Robson v. Harwell*, 6 Ga. 596; *Loomis v. Newhall*, 15 Pick. 159; *Johnson v. Buck*, 35 N. J. L. 340; *Bentham v. Hardy*, 6 Ir. L. Rep. 183; *Burnard v. Nerot*, 1 C. & P. 580; see 10 Amer. Jur. 245-7.
- (b) *Loomis v. Newhall*, 15 Pick. 159; see *Thomas v. Williams*, 10 B. & C. 668, *infra*.
- (c) *Hall v. Denholm*, 11 U. C. Q. B. 356.

the vendee cannot set up an oral agreement by the vendor to pay incumbrances, which, even if valid if independent, is part of an oral contract.(d) In a Vermont case the court said: "In the case before us the warranty was in terms a part of the contract of sale, and the consideration of the whole contract was entire and indivisible, viz.: \$8000 to be paid for the whole land and the right to the spring and the guaranty as to the quantity of one parcel of said land;" though it was held that the part actually performed was not affected by the Statute of Frauds; and the rule of law is, "that in case a contract for the sale of land, or of an interest in or concerning land, embraces some subject-matter of a different character, which stands in the contract upon a distinct consideration, so that the contract, both in its subject-matter and the consideration, is divisible and separable, such contract, though not in writing, may be enforced by suit as to such part of it as does not fall within the operation of the Statute of Frauds; while that statute would effectually preclude an action upon the other part of it."(e)

After delivery of chattels an oral warranty cannot be sued on, because it is part of an entire contract which was in writing and not to be contradicted by oral evidence, and because the warranty, if independent, was an oral agreement for the sale of chattels.(f) A person seeking to enforce a contract cannot waive the invalid oral provisions, though made for his benefit, and enforce the rest.(g) Where the plaintiff worked under an oral contract for the defendant for a consideration partly of money and partly of land, and the special contract was put an end to by the defendant, a *quantum meruit* will lie, because the whole special contract being entire is at an end both as to the realty and to the personalty.(h)

§ 692. Another test by which to tell whether a contract partly affected by the Statute of Frauds is severable or not, is the singleness of the consideration, and ordinarily if there is but one consideration indivisible the statute applies.(i) In a case in the Supreme Court of New York the consideration test was strongly insisted on; and it was said that

The singleness of the consideration.

(d) *Duncan v. Blair*, 5 Den. 196.

(e) *Dyer v. Graves*, 37 Vt. 373, citing cases.

(f) *Lamb v. Crafts*, 12 Metc. 353.

(g) *Davis v. Shields*, 26 Wend. 347; see *Dow v. Way*, 64 Barb. 257.

(h) *Mackubin v. Clarkson*, 5 Minn. 253.

(i) *Thayer v. Rock*, 13 Wend. 53.

if one part of an entire contract is void by the Statute of Frauds the whole is void. There are cases in which it has been held that when a contract which is void by the Statute of Frauds for not being in writing contains a provision by which one or other of the parties has contracted to do or not to do some act, &c., the agreement to do, &c., which the law does not require to be in writing in order to be valid, such an agreement may be the ground of an action when it can be separated from that part of the contract that is void because not in writing; but the provisions of a contract not required to be in writing by the statute cannot be separated from those which are required to be in writing, so as to be the basis of a recovery in an action at law, unless they are supported by a separate and distinct consideration; while both rest upon the same consideration, the provisions are inseparable and void. The apparently conflicting cases can all be harmonized, said Judge Mulin, upon applying to them this test: where the consideration is distinct, the agreement without the Statute of Frauds will support an action, unless the provisions are so connected that it is obvious that if the parties could have anticipated a separate liability on each agreement the entire contract would not have been made.(j)

An independent oral contract within the Statute of Frauds cannot be proved under the excuse of proving the consideration.(k) Where the different parts of the contract within and without the Statute of Frauds are each on a separate consideration, that part which is without the scope of the statute is enforceable.(l) Where a portion of a contract relating to land is in parol, it may be sued on if its enforcement does not tend to carry out the sale of an interest in land, and if the stipulation is severable and capable of being separately enforced.(m)

Where one has contracted for the purchase of land by an agreement partly written and partly printed, and has obtained possession upon performance of the written terms, to retain possession and refuse to carry out the verbal terms would be a fraud which takes the case out of the statute.(n) It need scarcely be said that none of the general statements given above are of much value either as abstract definitions or practical tests.

(j) *Dow v. Way*, 64 Barb. 257.(m) *Wetherbee v. Potter*, 99 Mass. 361.(k) *Howe v. Walker*, 4 Gray, 318.(n) *Jervis v. Berridge*, 27 L. T. N. S.(l) *Dow v. Way*, *supra*.

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§ 693. For the purpose of definition it is difficult to formulate the law in any way which will not give a truism or an identical statement thinly disguised, by putting in the predicate a synonym of the leading word of the subject clause. A category of examples is the only resort, and of these the following will show generally how the law is applied. Thus, an agreement to rent both land and tithes is performed by an actual commutation of tithes, and an entry upon the land for a year creating a tenancy on which distress will lie; though the agreement to rent both land and tithes would have required a deed.^(o) The selling of land or goods by lots is an instance of a contract calling for the decision of the doubt whether the case is that of one entire contract or that of a number of separate contracts. Thus, where several lots of land are sold under distinct articles of sale, they are separate transactions.^(p)

General examples of the rule.

Where there are a series of sales of lots of land or of goods, though on the same occasion and to the same purchaser, they may be separately treated if at different prices, but will be treated as one if for a lump sum.^(q) Where sales of goods are made for separate prices, each price being less than the exception fixed in the statute, each contract will be considered to be within the exception.^(r) Where an auctioneer sold a number of lots of standing wood, some of which were within the county for which he was licensed and some not, it was held that for the sale of the former he could recover his commissions, and for the latter not.^(s)

Where the printer of a book, after he had printed the preface, discovered that it was libelous, he could refuse to deliver it, and could recover the cost of the lawful part of the book.^(t) Where by separate sales goods are sold in violation of a liquor law, and also other goods are at another time sold and one note taken for the price of both, those lawfully sold are the subject for a recovery.^(u) It has been held that a written promise to pay for past and future

(o) *Meggison v. (Lady) Glamis*, 7 Exch. 688; see *Chambers v. Griffiths*, 1 Esp. 151; *Carleton v. Woods*, 28 N. H. 294.

(p) *Buckmaster v. Harrop*, 7 Ves. 344; see *James v. Shore*, 1 Stark. 426; see as to chattels, *Champion v. Short*, 1 Campb. 53; *Bailey v. Sweeting*, 9 C. B. N. S. 857; 30 L. J. C. P. 150; 9 W. R. 273.

(q) *Jenness v. Wendell*, 51 N. H. 68; (r) *Emmerson v. Heelis*, 2 Taunt. 38; see *Watling v. Horwood*, 12 Jur. 49.

(s) *Robinson v. Green*, 3 Metc. 159.

(t) *Clay v. Yates*, 1 H. & N. 77.

(u) *Pecker v. Kennison*, 46 N. H. 489.

supplies to a third party is severable; and though the first part is without consideration, there may be a recovery on the latter.(v)

§ 694. The doctrine of the severability of a contract is shown by these last few cases to be a general one, and to be governed in matters unconnected with the Statute of Frauds by much the same consideration as in those with which the statute deals. Of the latter class, a convenient and not altogether arbitrary arrangement may be made by following out the subject-matter of the various contracts. Thus the following are examples of agreements including both land and labor; first, those that are inseverable. Thus it has been held that a lessor who has improved premises under an oral agreement to lease as improved, cannot recover for his improvements and fixtures added under the general contract.(w)

Where one in possession of land under an oral contract to buy, cuts grass and puts it into the owner's barn and the vendor rescinds, the vendee cannot recover for work and labor.(x) Where there was a written contract to sell certain land with the houses thereon being built, the latter to be finished by a given date, and the plaintiff, relying on the written contract, offered to show that the time for finishing the houses had been orally extended; the court, in passing upon the question whether a written contract within the Statute of Frauds could be changed by a later oral agreement, held that the above contract was indivisible, and the stipulation as to the labor required upon the houses would not be taken alone and considered as not affected by the statute.(y)

A parol contract reserving from a demise of lease, the right to recover the value of growing crops and of work and labor previously bestowed on the land, this reservation being part of the consideration of the contract of letting, is within the Statute of Frauds as to the crops, and though *query* as to the work and labor, the two forming together but one consideration, separate recovery cannot be had for the work and labor.(z) An oral agreement under which one S. let to Carter certain land, and the latter agreed to take the

(v) Wood v. Benson, 2 C. & J. 98; 2 Tyrw. 97, citing cases.

(z) Cook v. Doggett, 2 Allen, 439.

(y) Ladd v. King, 1 R. I. 226.

(w) McMullen v. Riley, 6 Gray, 500; Vaughan v. Hancock, 3 M. G. & S. 769; 16 L. J. C. P. 1.

(z) Falmouth (Earl of) v. Thomas, 1 Cr. & Mees. 106; 3 Tyrw. 26.

lease on the express condition that S. should put the property in repair, and that there should be no rent till this was done, whether enforceable or not against S. is of no effect as against Salmon, a mortgagee without notice.(a)

Where there was a written promise insufficient under the Statute of Frauds to pay a certain sum for certain land, if the promisor was satisfied with the latter; and it was further agreed that the promisor should pay the promisee for boarding the promisor and for painting his portrait; the court said: "I. These provisions of the contract are based entirely upon the agreement for the sale of the land, which of itself is invalid, and for that reason insufficient to sustain the other conditions of the contract. II. The contract is not severable. To sustain it we must assume that the sale of the real estate was the basis of the agreement, and hence how can it be severed? The agreement was to purchase the real estate if the defendant was satisfied with the location and advantages, and in case no purchase was made, then to pay for the pictures, &c. It therefore depended upon the contract for the sale of the real estate. This was the foundation of the whole contract, and a part of it cannot be separated, so as to make it distinct from the remainder."(b)

§ 695. Another class of cases are those which include land and chattels or money; and the following are examples of such which have been regarded as inseverable. Thus, ^{Land and chattels contracts.} generally an entire contract for land and goods is within the Statute of Frauds as to both.(c) An assignment or mortgage by a debtor of his property real and personal must be in writing, the transaction being entire.(d) Where there was a contract including both realty and personalty the court in a case in Anstruther said: "The agreement being void as to the land must

(a) *Carter v. Salmon*, 43 L. T. N. S. 490, explaining *Morgan v. Griffith*, L. R. 6 Ex. 70, and *semble*, *Mann v. Nunn*, 43 L. J. C. P. 241, as cases of severable stipulations; citing also *Angell v. Duke*, L. R. 10 Q. B. 174, and *Erskine v. Adeane*, L. R. 8 Ch. 756.

(b) *DeBeerski v. Paige*, 47 Barb. 174; 36 N. Y. 539, citing several cases, and distinguishing *Darling v. Rogers*, 22

Wend. 483, as a case of contract clearly severable.

(c) *Myers v. Schemp*, 67 Ill. 471; *Clancy v. Craine*, 2 Dev. Eq. 365; *Vaughan v. Hancock*, 3 M. G. & Sc. 769; 16 L. J. C. P. 1; *Patterson v. Cunningham*, 3 Fairf. 510.

(d) *Lill v. Brant*, 6 Bradw. 372, citing cases.

be void also as to the personal property which was to be sold with it; it is one entire contract, and the whole must stand or fall together. It never could be the intention of the parties that the stock should be sold apart from the premises, as most of it was of little comparative value separately, and besides, the agreement being for one entire sum, we cannot sever it.”(e)

A promise between betrothed persons, each not to claim legal rights at decease of the other, is not an agreement in consideration of marriage (but rather one in contemplation of marriage), for the marriage question was settled; but as there was real estate the contract was within the land clause, and not severable, was totally invalid.(f) Where the plaintiff took a brickyard of the defendant’s, who was a tenant under an oral agreement, by which the defendant was to pay the rent then due and see that his lessor accepted the plaintiff as tenant, and by which the bricks in the yard were to be taken at a valuation, and a distress was levied upon the property in the plaintiff’s hands for rent; it was held that an action to recover the amount of rent, &c., paid by the plaintiff would not lie, for the contract was entire and inseverable.(g)

Where there was an oral sale of brick in a burnt building, part of which had been severed from the land by the fire, &c., and part not, the whole was held to be within the Statute of Frauds.(h) Where the declaration stated, as the consideration for the defendant’s promise, that the plaintiff was to become tenant to the defendant of the house and furniture both upon the performance of certain conditions, and a demurrer to the defendant’s plea of the Statute of Frauds stated the promise related merely to the chattels, that the promise to take possession of the house, &c., was not the contract but only the consideration thereof; it was held that the pleadings showed an entire inseverable contract within the statute.(i) A promise to give money and land for a single service, for example making a sale of land, is inseverable and within the Statute of Frauds.(j)

(e) *Cooke v. Toombs*, 2 Anst. 424; see *Lea v. Barber*, Id. 425.

(f) *Rainbolt v. East*, 56 Ind. 538, citing *Rand v. Mather*, 11 Cush. 4.

(g) *Hodgson v. Johnson*, E. B. & E. 689; 28 L. J. Q. B. 88, citing *Kelly v. Webster*, 12 C. B. 283, and distinguishing and doubting *Green v. Saddington*.

(h) *Meyers v. Schemp*, 67 Ill. 471, citing cases.

(i) *Mechelen v. Wallace*, 7 A. & Ell. 57; see *Angell v. Duke*, L. R. 10 Q. B. 177.

(j) *Fuller v. Reed*, 28 Cal. 99.

An entire contract to pay money and convey land, though in the alternative to pay the money or convey the land at the defendant's election, is within the statute.^(k) So a promise to procure a third person to convey land, or himself to pay money in event of failure to do so.^(l) A promise to pay for the land of the defendant's, taken for a highway which specially benefited the defendant, and to pay for other land of the defendant, is entire and within the Statute of Frauds, though the statute only applied to the latter clause.^(m)

Where the contract is clearly severable, one part relating to realty, the other to personalty, the latter part is not within the Statute of Frauds.⁽ⁿ⁾ Where the plaintiff and defendant were negotiating as to a lease, and the defendant promised the plaintiff that if he would become tenant he the defendant would repair the premises and put in more furniture, and the plaintiff became tenant; it was held that this contract was not within the fourth section of the Statute of Frauds; that if the contract had bound the plaintiff to become tenant the whole agreement would have been within the statute, but the agreement was, "if you become tenant I will do so and so;" this last is collateral to the tenancy, and is not within the statute.^(o) Where the plaintiff agreed to deliver the possession of land and to sell farm stock and standing wheat thereon, and the defendant agreed to take these, the court thought in the particular case that the part of the contract relating to the possession was separate from the rest, so that the latter might be separately enforced; the evidence showed that up to the date of the possession to be taken the plaintiff was a tenant of the land, but whether he had any interest after that date did not appear.^(p)

In an early Georgia case the court said, speaking of the contract in suit, "that this contract is separable. The stipulations of Walton are that he will convey the land and also the personal property

(k) *Patterson v. Cunningham*, 3 Fairf. 510.

(l) *Mather v. Scoles*, 35 Ind. 3, citing *Goodrich v. Nicholls*, 2 Root, 498; *Patterson v. Cunningham*, see *supra*. See *Johnstone v. Cowan*, 25 U. C. Q. B. 470.

(m) *Crawford v. Morrell*, 8 Johns. 256.

(n) *Gilmore v. Johnston*, 14 Ga. 685.

(o) *Angell v. Duke*, L. R. 10 Q. B. 177, citing *Morgan v. Griffith*, L. R. 6 Ex. 70,

and distinguishing *Cocking v. Ward*, 1 C. B. 867, as a case where, whether rightly or wrongly, the plaintiff was held to have bound himself to make a surrender. Here the plaintiff was not bound to become a tenant. And *semble* denying *Mechelen v. Wallace*, 7 A. & E. 57.

(p) *Mayfield v. Wadsley*, 3 B. & C. 361; 5 D. & R. 224.

to Mrs. Harwell. It is not like a promise to pay in one contract two sums of money, but it is to do two acts, to wit, convey the land and convey the personalty. There are, in fact, two trusts declared, one of the lands and the other of the personalty. The subject-matter is different and the mode of conveying different. *The one act does not depend upon the other.* If Walton had chosen to do so, he could have executed this agreement as to one subject-matter and not as to the other, and the execution would have been held good *pro tanto*. The contract here is in all its parts a legal contract. It is legally sustained as to the personalty by the evidence, and not so sustained as to the realty;" the court distinguished the cases of an indivisible consideration and those of illegal agreements.(q)

A lessor who verbally promises a negotiating lessee that a superfluity of game on the land shall be killed, and that the shooting shall not be let, is bound, though the lease is drawn in the usual way and reserves the right to keep up the game.(r) Where the plaintiff holding a note secured by a mortgage of land and by a certain guaranty, agreed to cancel the note and assign the guaranty and the mortgage to the defendant, who promised to give his own note and certain oxen; in a replevin for the oxen the defendant said that the agreement as to the mortgage was within the Statute of Frauds; but the court held that the contract was severable, and that, in absence of evidence that the oxen were worth more than what was due the plaintiff on the valid part of the agreement, the plaintiff could recover.(s)

§ 696. Another class of contracts are those which include both labor and chattels. Thus, in a contract for the sale of chattels, the portion relating to freight cannot be separately enforced.(t) Because chattels are sold at a higher price than the market or because the seller undertakes to transport them, the contract is not the less within the seventeenth section of the Statute of Frauds.(u)

(q) Robson v. Harwell, 6 Ga. 596.

(r) Erskine v. Adeane, L. R. 8 Ch. App. 756; 42 L. J. Ch. 849.

(s) Jenkins v. Williams, 16 Gray, 159.

(t) Irvine v. Stone, 6 Cush. 503, citing *Ex parte Littlejohn*, 3 M. D. & DeG.

186, and other cases; and saying that *Lexington v. Clarke*, 2 Vent. 223, *Chater v. Beckett*, 7 T. R. 204, and *Thomas v. Williams*, 10 B. & C. 668, went on the variance between the *allegata* and *probata*.

(u) Astey v. Emery, 4 M. & S. 264.

An entire contract for goods made and to be made is invalid even as to the latter.(v) Where the plaintiff sold horses to the defendant and agisted other horses belonging to the defendant, it was held that the agistment was an ancillary part of the agreement; that the consideration was entire and inseverable, and that the Statute of Frauds applied.(w) Where it is agreed to make one payment for money due and for goods to be bought, the contract is inseverable and within the statute.(x)

§ 697. Another class of contracts are those which comprehend an original promise and a guaranty; and the following are examples of such contracts which are inseverable as ^{Guaranty and original} to their stipulations. Thus, where the defendant, an auctioneer about to sell on the premises of one T. T. goods of the latter, promised the plaintiff, a landlord who gave him notice of rent then due for the premises by T. T., to pay the plaintiff such rent then due and certain other rent about to become due; this was held to be within the Statute of Frauds as to the future rent, and being an entire contract within the statute even as to rent past due; the landlord as to the future had no right of distress, and as to that could not have interfered with the defendant's sale.(y)

So a promise that if the plaintiff will continue to work for a third person, the defendant will pay what such third person owes the plaintiff, is entire, and no recovery can be had even for labor subsequent to the promise.(z) A promise by a father to pay for his son's default in consideration of a forbearance to sue the son, who had fraudulently violated a contract by converting to his own use goods which he had undertaken to carry to a consignee, and also to repay to the injured party his expenses in a suit brought against the son, is entire and inseverable, though the latter stipulation is not within the Statute of Frauds.(a)

Where the defendant promised that if the plaintiff, the creditor of one H., would forbear suing H. he, the defendant, would accept bills drawn on him by the plaintiff for a composition of H.'s debt to the plaintiff, and would pay the plaintiff's expenses in the suit

(v) *Atwater v. Hough*, 29 Conn. 513. 668, citing *Lexington v. Clark*, 2 Vent.

(w) *Harman v. Reeve*, 18 C. B. 595; 223; *Chater v. Beckett*, 7 T. R. 204.
25 L. J. C. P. 257.

(z) *Noyes v. Humphreys*, 11 Gratt.
(x) *Head v. Baldrey*, 6 A. & Ell. 468. 636. See "Guaranty."

(y) *Thomas v. Williams*, 10 B. & C. (a) *Turner v. Hubbell*, 2 Day, 459.

against H. which the plaintiff withdrew, the defendant accepted the bill but would not pay the expenses; it was held that the contract was partly within the Statute of Frauds, and was inseverable, and that the plaintiff could not recover. The expenses were, it seems, not costs for which H. was liable, nor could the plaintiff recover on the general counts, as the money was not paid by the plaintiff to use of the defendant, but to the plaintiff's own use.(b)

Where the plaintiff had demised to B., now deceased (C. the defendant married B.'s widow), and B. owed rent; his widow promised to pay both what B. owed and rent subsequent for her own occupation; the consideration of the contract was executed. The plaintiff said that even grant the Statute of Frauds applied to what B. owed, he could recover for rent due from Mrs. B. herself. But the court said that plaintiff could get neither, for it was an entire agreement as set out in the *narr.*(c)

§ 698. The following are examples of severable contracts of guaranty. A guaranty for "all current obligations and engagements in" the "hands" of the promisee "to which" J. B. M. "might be a party, and" also all his future obligations that may come into the hands of the promisee, is a severable promise, and can be sued upon so far as relates to discounts given by the promisee subsequent to the guaranty.(d) Where the plaintiff agreed to do certain work for W., but suspended his labor because of W.'s failure to pay, and the defendant told the plaintiff to finish the contract and that he would pay him in full; it was held that the plaintiff could recover for the work performed after the promise.(e) Where the owner of a building

(b) *Chater v. Beckett*, 7 T. R. 204.

(c) *Lexington v. Clarke*, 2 Vent. 223.

(d) *Ex parte Littlejohn*, 3 M. D. & DeG. 186.

(e) *Rand v. Mather*, 11 Cushing, 4. The court said that *Loomis v. Newhall*, 15 Pick. 159, was decided on authority of *Lord Lexington v. Clarke*, and that *Chater v. Beckett* overruled *Loomis v. Newhall*, which was not noticed in *Irvine v. Stone*, 6 Cush. 511, but that *Irvine v. Stone* was followed in the principal case. That in *Loomis v. Newhall*, there was, however, a general count

which would have authorized the proof which in *Lexington v. Clarke, &c.*, was variant. On page 6 the court cited many analogous cases not under the Statute of Frauds; and on page 8, *Mayfield v. Wadsley*, 3 B. & C. 361, *Ex parte Littlejohn*, *supra*, *Wood v. Benson*, 2 Tyrwh. 93, were cited as severable contracts under the Statute of Frauds, and *Lea v. Barber*, 2 Anst. 425; *Mechelen v. Wallace*, 7 A. & E. 57; *Vaughn v. Hancock*, 3 M. G. & S. 769, *Irvine v. Stone*, *supra*, as inseverable. *Wood v. Benson* was said not to be distinguishable from the

which was in the course of erection said to a material-man that he would pay for all material furnished the contractor who was putting up the house, and the material was thereafter charged both to the owner and the contractor; it was held that the owner was liable for the goods furnished after the promise, but not for those before.(f) Where the mother of a bastard, of which the defendant was the reputed father, paid the plaintiff for the board of the child and for the care of herself during confinement; and there being a balance due the plaintiff under this arrangement, the defendant promised to pay this, and also the amount to be due for the future board of the child; it was held that the defendant was liable on the latter stipulation, though not on the former.(g)

Where a physician who had been attending a pauper under an agreement with the latter's father, and who had found that the father was unable to continue payment, went to the overseers of the poor, and by an arrangement with them and under their sole credit continued his attendance, he can recover from them for all charges due after their promise.(h) Where a tenant assigned his lease, and the assignee, the defendant, promised the landlord that if he would assent to the assignment, he, the assignee, would pay the assignor's arrears; the defendant is liable for the rent due during his occupation, though there was but one promise covering both liabilities.(i)

§ 699. The above cases, which of those already considered show the most important exception to the rule of the inseverability of a contract, go, it will have been noticed, upon a distinction drawn at a point of time; that is to say, the part within the Statute of Frauds can be separated from that without the Statute, by taking the date of the promise, and saying that as to all liability existing before that date the Statute applies but to future liability it does not apply. This rule, with that of part performance to be presently considered,

The severability by making a point of time the point of division.

principal case, and that in that case *Lexington v. Clarke*, *Chater v. Beckett*, and *Thomas v. Williams*, 10 B. & C. 668, were distinguished as rightly decided on the variance between the *allegata* and *probata*. On page 6, *Gordon v. Martin*, Fitzg. 302, also was cited.

(f) *Owen v. Stevens*, 78 Ill. 463; see *Luce v. Zeile*, 53 Cal. 54.

(g) *Haynes v. Nice*, 100 Mass. 327.

(h) *Lyde v. Higgins*, 1 Smith (Eng.), 305.

(i) *Fowler v. Moller*, 4 Bosw. 154; citing *Curtis v. Leavitt*, 15 N. Y. 124, and other cases; questioning *Van Alstine v. Wimple*, 5 Cow. 163, and *Lexington v. Clarke*, *supra*.

form the ordinary instances of importance of an infraction of the general doctrine that a contract partly within the Statute of Frauds is wholly so. A promise to pay for lumber to be furnished one A., who was building a boat for the defendant, and also to pay another debt of A., is severable; and the former stipulation is the subject for a recovery but not the latter; and the latter is not taken out of the Statute of Frauds by the nature of the consideration of the former.(j) "I hereby obligate myself to hold you harmless for any endorsement you may make or have made for the late firm of A. B., not exceeding," &c., was held to express consideration, i. e., the making of future endorsements; the provision as to past endorsements, though bad, did not invalidate the rest.(k) Where a contract of insurance covered risk by fire and also the default of third person, it is severable, and the former promise can be sued on.(l)

§ 700. Another class of cases are those which include a promise in consideration of marriage and also other stipulations not affected by the Statute of Frauds; thus where, by a parol ante-nuptial agreement, a husband and wife agreed that she should enjoy her estate as if sole, and in consideration thereof she agreed to give up her dower, &c., in his estate; the wife was permitted by the husband to use her estate independently, she giving some of it to her children by a previous marriage, &c. It was held that though the contract was not altogether in consideration of marriage, but being entire, the whole contract was within the Statute of Frauds as one in consideration of marriage.(m) A promise by a woman that if a man will marry her and will enter upon and improve land belonging to her, she will convey it to him, is an entire one, and the Statute of Frauds applies.(n)

The last class of contracts with which the present subject is concerned are those in which there are stipulations not to be performed within a year, and others which can be so performed. Thus, where a servant is engaged by an oral contract for a year at so much a year, and is to serve so much longer as will repay the master a further sum lent by him to the servant, the plaintiff cannot recover

(j) *Rounds v. May*, 35 U. C. Q. B. 368.

(m) *Finch v. Finch*, 10 Ohio St.

(k) *Staats v. Howlet*, 4 Denio, 566. 505.

(l) *Mobile Ins. Co. v. McMillan*, 31 Ala. 720.

(n) *Henry v. Henry*, 27 Ohio St. 128.

even for a year, the contract not being severable.(o) A contract by one of the age of sixteen to serve till twenty-one is an entire contract, and within the Statute of Frauds.(p) It seems, that an agreement to give a three years' lease of land, and to assign the goodwill of a medical practice, is wholly within the Statute of Frauds if the first portion of it were so, through the three years not beginning to run until a date later than the promise itself.(q)

§ 701. As has already been said, the most important exception to the rule that a contract partly within the Statute of Frauds is entirely so, is brought about by the application to the contract of the doctrine of part or full performance. As will be seen by a reference to the chapter on that subject, voluntary performance of that portion of a contract which is affected by the Statute of Frauds will leave the rest enforceable. Before giving a few further examples of this rule, it may be well to note that as a broad principle the effect of such performance has been in some cases denied. Thus, in a New York case given in the note there is a *dictum* which says that the voluntary performance of part of a contract which is void is no reason to compel a fulfillment of the remainder.(r) Where the plaintiff sued for the specific performance of a contract of sale of land, and for the breach of warranty in re-

The effect of performance.

(o) *Currie v. McLean*, 2 Macphers. (Scotch) 1076.

(p) *Mack v. Bragg*, 30 Vt. 572.

(q) *Christie v. Clarke*, 16 U. C. C. P. 551.

(r) *Dow v. Way*, 64 Barb. 257. See § 692 as to the facts, citing for this point under the Statute of Frauds: *Van Alstine v. Wimple*, 5 Cow. 163; *Lexington v. Clarke*, 2 Vent. 223; *Chater v. Beckett*, 7 T. R. 201; *Crawford v. Morrell*, 8 Johns. 253; (these cases minutely discussed), and it was said that in *Mayfield v. Wadsley*, 3 B. & C. 361; *Wood v. Brisbin*, 2 Cr. & J. 94; *Rand v. Mather*, 11 Cush. 4; *Irvine v. Stone*, 6 Cush. 511; the parts of the contract were held to be severable. In *Wood v. Brisbin* the court said that in the cases in 2 Vent. and 7 T. R. there was no consideration on which the plaintiff could recover. But in the principal case it is considered that the reason for the non-recovery in these cases was on the

ground of the contract not being severable. That in *Irvine v. Stone*, while the consideration was severable the two parts of the contract were not independent, and would not by the parties have been separately made. *Allen v. Aguirre*, 3 Seld. 543, was distinguished on the grounds that there the goods were delivered and paid for, and the statute thereby satisfied; that there was no contract of sale before the delivery of the goods and the payment of the price; and the rest of the contract was not within the Statute of Frauds. But that in the principal case the consideration was not severable. See also *Van Alstine v. Wimple*, 5 Cow. 162. In *Hess v. Fox*, 10 Wend. 436, a *dictum* in *Van Alstine v. Wimple*, that part of an entire contract within the Statute of Frauds being executed, an action will lie on the rest, was denied.

spect to certain flax whose sale formed with the land part of the same entire contract, the plaintiff paid the purchase-money, took and held possession of the land, and harvested the flax. It was held that, there being equitable part performance, the plaintiff could at his election have either specific performance, decree, or have an abatement out of the purchase-money or compensation for any deficiency in the title, &c., to the land; *i. e.*, the purchaser, the plaintiff, could have entire specific performance, decree, or partial performance with compensation for any part which the defendant could not perform; but that no action at law would lie because of the Statute of Frauds; that the contract was not good even as a measure of compensation (*Erben v. Lorillard*, 19 N. Y. 299). That a voluntary performance even of all that part within the statute would not take the residue out of the statute (*Baldwin v. Palmer*, 10 N. Y. 232), therefore the plaintiff could not have damages for the breach of warranty, as the sale of the flax being part only of the contract was void under the Statute of Frauds, and as equitable specific performance could only decree a conveyance of the land; damages for breach of the warranty not being part of the equitable relief in respect to the land. [This action could only have been brought, as it was, in a court where law and equity are completely fused.](s)

§ 702. The following are examples of the effect of voluntary performance of part of a contract rendering the rest enforceable. Thus, where the plaintiff agreed to give the defendant £37 for the tenant right, &c., of certain premises, and it was agreed that the defendant should repay the plaintiff £10 if the town council were to refuse a certain license; the plaintiff having taken possession and been refused the license, it was held that the part of the contract within the Statute of Frauds having been executed, the rest was severable and could be enforced.(t) In an action for goods sold and delivered to defendant, it was proved that by a parol agreement the defendant contracted in consideration of being forgiven the amount he owed the plaintiff, including the sum in suit, and being paid £100, he should give up to the plaintiff the possession of certain premises of which he was

(s) *Harsha v. Reid*, 45 N. Y. (6 C. 361; 5 D. & R. 224, where the agreement as to crops was considered to have been performed.

(t) *Green v. Saddington*, 7 E. & B. 507; see *Mayfield v. Wadale*, 3 B. &

tenant, and under the contract the defendant was paid the £100 for which he gave a receipt and stating his agreement to give up the possession of the premises as above, and the plaintiff took possession of the premises. It was held that the parol evidence of accord and satisfaction was admissible, for the portion within the Statute of Frauds, namely that relating to the land, had been executed,^(u) thus distinguishing the case from *Smart v. Harding*.^(u)

Where under a written agreement the defendant took possession of the plaintiff's mill, though no lease was made; it was held that an oral stipulation to pay for the goods in the mill could be enforced, as that relating to the land had been fulfilled.^(v) Speaking of a contract to convey land and sell a crop to be planted thereon, the court in a New York case said: "The invalidity of the parol agreement to sell and convey the land did not affect the plaintiff's title to the crop. If the agreement had remained executory in all its parts, of course none of its stipulations could have been separately enforced, though if standing alone they might have been valid. But although, by reason of the entirety of the contract, the plaintiff could not have enforced the stipulation allowing him to possess and work the farm so long as it remained executory, yet after it had been so far executed that the crop had been sown and was growing, the invalidity of the other provisions of the contract, under the Statute of Frauds, could not be invoked by the party who refused to complete, as against the party not in default, for the purpose of invalidating that part of the contract which had been executed, and divesting the plaintiff's title to the crop raised in pursuance of it."^(w)

Where three persons agree to buy land, two of them to furnish the money, and it is agreed that drafts should be drawn on one of these two, the other to reimburse him; the promise to reimburse is not within the Statute of Frauds.^(x) A running contract for the sale of goods may be severed, it would seem, at a point as to the goods actually delivered and taken; and this though the contract as a whole was invalid within the year.^(y) As to the effect of full or

(u) *Lavery v. Turley*, 6 H. & N. 239; 30 L. J. Exch. 49.

(u') 15 C. B. 652.

(v) *Knight v. New England &c. Co.*, 2 Cushing, 289.

(w) *Harris v. Frink*, 49 N. Y. 27; 2 Lans. 35.

(x) *Wetherbee v. Potter*, 99 Mass. 361.

(y) *White v. Hanchett*, 21 Wis. 415;

see also *Bigg v. Whisking*, 14 C. B. 198, as to a contract as to timber made severable by part performance.

part performance upon contracts within the "Year" clause, see "Year."

§ 703. The following are some examples of the effect of part performance in making contracts severable. Thus in a Pennsylvania case, Chief Justice Gibson, though admitting that a contract partly within the Statute of Frauds was as invalid as if it were entirely so, yet said that, where A. agreed by parol to convey to B. Blackacre, and B. in consideration thereof agreed also by parol to convey to A. Whiteacre and assume some debts which were incumbrances on Blackacre, here A. or his privies, after Blackacre had been conveyed, could bring ejectment for Whiteacre, and the Statute of Frauds was no defence; the agreement relating to the debts, whether a guaranty or not, being treated as partly performed by the conveyance of Blackacre and therefore without the statute, so as even to cause an action for the non-payment of such debts to lie under the contract (in the actual case the stipulation to pay the incumbrances not having been insisted on was treated as obsolete and out of the way.^(z))

Where the owner of land promised one who without permission had occupied it and made improvements to sell him the land and to pay him for the improvements, the Statute of Frauds applied as to the land, but not as to the improvements.^(a) Where the plaintiff made an oral contract with the defendant that he should come and live with the latter, take care of him and of his property; and in consideration of this the defendant agreed to make plaintiff a proper written agreement or conveyance of his the defendant's farm and property; the plaintiff expended money and labor on the faith of this contract, which the defendant refused to fulfill. It was held that the plaintiff could recover what he had so expended for his services; that part of the original oral contract related to personalty, and was therefore not within the Statute of Frauds; and while if part of the consideration of a contract is illegal the whole may be vitiated, yet where part of the consideration is only void or voidable it does not affect the rest (distinguishing on this ground *Crawford v. Parsons*, 18 N. H. 293).^(b)

(z) *Dock v. Hart*, 7 W. & S., citing cases.

(a) *Frear v. Hardenburgh*, 5 Johns. 272.

(b) *Clements v. Marston*, 52 N. H. 38; questioning *Lane v. Shackford*, 5 N. H. 130, and adding that even as to the enforceable part of the contract no

A plaintiff who had been working partly for money and partly for land, can recover on a *quantum meruit* when the oral contract is determined by the defendant, because being entire and partly within the Statute of Frauds, the oral contract is invalid *in toto*.(c) A bill of sale of goods being given under an oral sale of land and goods, will not prevent oral evidence being given, there being part performance.

Under a contract to perform labor on the land of the defendant for a share of the crop, the defendant, having rescinded, must pay for the labor.(d) As to an acceptance of one of several lots of goods having the effect of taking the entire agreement out of the Statute of Frauds, see "Acceptance, &c.," and "Chattels." Performance of that part of an entire oral contract which is within the statute will, as in the case of a promise to answer both for the past and future liability of a third person, leave enforceable the valid portion.(e)

The following are some examples of part performance ineffectual to take an entire contract out of the Statute of Frauds. Thus part performance as to one of several lots sold, will not affect the others.(f) So in the case of a contract of land and goods, part performance as to both stipulations will not at law satisfy the statute.(g) An entire contract for realty and personalty is part-performed as to the land by possession, improvement, and part payment. The vendor cannot, as to the personalty, set it aside so as to get back the latter.(h)

action lay if the defendant was willing (f) *Buckmaster v. Harrop*, 7 Vesey, to perform the whole agreement; and 344.
citing cases.

(c) *Mackubin v. Clarkson*, 5 Minn. 253.

(d) *Moore v. Ross*, 11 N. H. 547.

(e) *Fowler v. Moller*, 4 Bosw. 154.

See *Rogers v. Rogers*, 6 Jones, 303.

(g) *Mechelen v. Wallace*, 7 Adol. & El. 57.

(h) *Smith v. Smith*, 14 Vt. 445; see also *Wentworth v. Buhler*, 3 E. D. Sm. 305.

CHAPTER XXXIII.

LAND.

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| § 704. Division of subject. | § 731. Extent of the provisions of the statute. |
| § 705. FIRST, what is land? | § 732. General effect of the statute upon contracts touching land. |
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| § 708. <i>Fructus industriales</i> are personality. | § 735. Severability. |
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| § 714. Artificial fixtures. | § 741. Promise to convey as consideration for promissory note. |
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| § 716. Church pews, burial lots, &c. | § 743. Contracts of indemnity or warranty. |
| § 717. SECOND, what <i>interests</i> in land are within the statute. | § 744. Estoppel. |
| § 718. Easements. | § 745. Boundaries. |
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| § 729. THIRD, what contracts concerning land are within the statute. | § 756. Brokers' commissions. |
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| | § 758. Contracts for material and labor. |

§ 759. Distinctive Pennsylvania legislation.

§ 760. Action of damages for breach of oral contract.

§ 761. Measure of damages.

§ 762. Loss of bargain.

§ 763. What constitutes such fraud as will allow plaintiff to recover for loss of bargain.

§ 764. Non-compliance with bid at auction.

§ 704. To determine to what cases the Statute of Frauds applies is often a question of much nicety. It is as much within the province of this work as to construe the statute in its numerous applications; and in this chapter we will examine the cases which lie on the border line, and determine, as fully as the nature of the subject will permit, *what is land within the Statute of Frauds*. Division of subject.

To this end let us inquire:—

I. *What is land?*

II. *What interests in land are within the statute?*

III. *What contracts concerning land are within the statute?*

§ 705. And first, what is land? *Quicquid solo plantatur solo cedit*, was a maxim of the common law; and although many exceptions have been established, it still embodies the law in a general form, and serves as a good starting-point for our inquiries. First, what is land?

§ 706. Minerals in their natural position would reasonably be supposed to be land, and such are they considered in districts governed by sound law. Indeed so far has this doctrine been carried, that in Pennsylvania a leasehold interest in an oil well has been held to be within the Statute of Frauds, and in Kentucky a like conclusion was reached with regard to a salt well.^(a) But on the Pacific coast, where development of mining industries preceded development of law, the custom grew up of transferring mining claims by parol; and the judiciary, not daring to unsettle titles by enforcing the provisions of the Statute of Frauds, attempted to explain these conveyances as exceptions to the statute, holding that mining claims were mere rights resting in possession, not amounting to an interest in land, and therefore susceptible of transfer by parol and delivery of possession.^(b) But when Minerals.

(a) O'Donnell v. Brehen, 7 Vroom, Stranahan, 20 Cal. 208; Gatewood v. 257; Henry v. Colby, 3 Brewst. 175; McLaughlin, 23 Cal. 178; Antoine Co. M'Dowell v. Delap, 2 Marsh. 33. v. Ridge Co., 23 Cal. 222; Copper Hill

(b) Table Mountain Tunnel Co. v. Co. v. Spencer, 25 Cal. 24; Savage v.

the legislature saw fit to pass an act *allowing* conveyances of mining claims to be evidenced by bills of sale, or instruments in writing not under seal, the courts quickly seized upon it as an opportunity for withdrawing from their former position, and the "may" of the legislature became the "must" of the judiciary.(c)

When the mineral is once detached from the earth the case is different, even though the contract was made before the severance took place; as, where the owner of land and a brickmaker agreed that the bricks made should remain the property of the former until the clay was paid for, it was held to be a contract relating to personalty, and not within the Statute of Frauds.(d)

A fortiori, it would seem that a contract for the sale of manure, which is not a product of the land but a mere chattel deposited thereon, would convey no interest in the land and might be by parol; and this indeed seems to be the law on the subject, especially in the older cases.(e) But since it is the part of good husbandry to leave the manure on the premises where it is made if it is there needed, the rule has been established that, when made in the *course of husbandry upon a farm*, manure is so attached to and connected with the realty that in the absence of any stipulation to the contrary, it passes as appurtenant to it. And this rule is applied whether the manure is ready to be spread upon the soil, or whether it is in piles and not yet ready for that purpose.(f) The reservation from the deed may, however, be oral.(g) Where the manure is made about a hotel or livery stable the reason for the above rule does not exist, and the manure is treated as a chattel. This was admitted in the case in 13 Gray, and is also sustained by the later case.(h)

Stone, 1 Utah, 35; Kinney v. Virginia Mining Co., 4 Sawyer, 451. For a very elaborate discussion of this whole subject see Bingham on the Sale of Real Property, pp. 244 *et seq.*

(c) Patterson v. Keystone Mining Co., 23 Cal. 576; S. C. 30 Cal. 363; Draper v. Douglass, 23 Cal. 348; St. John v. Kidd, 26 Cal. 269; Goller v. Fett, 30 Cal. 484; King v. Randlett, 33 Cal. 321; Hardenburg v. Bacon, 33 Cal. 380; Felger v. Coward, 35 Cal. 652; Melton v. Lambard, 51 Cal. 258. Prior to the passage of the act of April 13th, 1860,

a bill of sale, *if used*, had to be under seal; McCarron v. O'Connell, 7 Cal. 152.

(d) Brown v. Morris, 83 N. C. 254.

(e) Parsons v. Smith, 5 Allen, 580.

(f) Fay v. Muzzey, 13 Gray, 53; Strong v. Doyle, 110 Mass. 93; Norton v. Craig, 68 Me. 275; Chase v. Wingate, *id.* 204.

(g) Strong v. Doyle, 110 Mass. 93; Conner v. Coffin, 22 N. H. 540, and cases cited.

(h) Fay v. Muzzey, 13 Gray, 53; Fletcher v. Herring, 112 Mass. 352, 384.

§ 707. The determination of the character of vegetable growths is the most important and at the same time the most difficult part of our subject. In the early cases the decisions were based upon fine distinctions, and as a consequence were very contradictory. Later the tide turned, and the other extremity was reached. The judges discarded the technical niceties of the earlier cases, and based their decisions on what they were pleased to call common sense, which in law, whatever its import elsewhere, means only confusion and disregard of precedent.

Vegetable
growths.

It has been thought by Littledale, J., and Chief Justice Coleridge has endorsed the view, that the statute was never meant to include any interests in land but those known to conveyancers; and this opinion seems to have ruled the first reported case on this subject; in which Treby, C. J., decided that a sale of growing timber need not be in writing by the Statute of Frauds. And to this opinion Powell, Justice, agreed.⁽ⁱ⁾

Unfortunately this plain path was not followed, and in the next half-dozen cases^(j) the court in each instance was a law unto itself, basing its decision on some fine technicality, which ought never to have been seriously considered.

(i) Anon., 1 Ld. Raymond, 182.

(j) We will examine these cases briefly. *Waddington v. Bristow*, 2 Bos. & Pul. 452 (1801), was the case of an agreement for the sale of all the hops which would be raised on a certain piece of land the ensuing year. The agreement was unstamped, and the question was, whether a stamp was not unnecessary, the contract being one for goods, wares, and merchandise. The court was unanimous in holding the agreement void for want of a stamp, *Heath and Rooke, JJ.*, deciding merely that as the subject-matter was not *in esse* at the time the contract was made, it could not be considered goods, wares, and merchandise, within the exception to the Stamp Act. Lord Alvanley, C. J., and Chambre, J., based their opinions on the ground that, as the agreement concerned the whole

produce of a certain tract, it was an interest in land.

This dictum was relied on in *Crosby v. Wadsworth*, 6 East, 602 (1805), where Lord Ellenborough, C. J., held an agreement that plaintiff should enter defendant's land, and cut and carry away a crop of grass, to be for an interest in land, because "conferring an exclusive right to the vesture of the land."

In 1809 two cases were argued within a week of each other. The first, *Emmerson v. Heelis*, in the Common Pleas, and the other, *Parker v. Staniland*, in the King's Bench. In *Emmerson v. Heelis*, 2 Taunt. 38, the agreement passed upon concerned turnips probably not mature (though this point does not definitely appear) and to be taken by the vendee. In this case it was held that there was a sufficient memorandum, but in passing, Lord Mans-

In 1827, in the case of *Evans v. Roberts*,^(k) a practical distinction was reached, and the rule laid down generally that the natural growths, such as trees, grass, fruit, and the like (*prima vestura*), are part and parcel of the realty, while those crops which depend principally upon the labor of man, and are included in the term emblements, are not within the meaning of the phrase "land or any interest in or concerning it."^(l)

field, C. J., let fall the *dictum* that, as concerning this contract being for an interest in land, it could not be distinguished from the case of hops (*Waddington v. Bristol*), decided in this court.

In *Parker v. Staniland*, 11 East, 362, the agreement concerned a crop of potatoes which were sold by the sack, and were to be taken out of the ground immediately by the vendee. The oral agreement was held good, Lord Ellenborough, C. J., saying, "It is probable that in the course of nature the vegetation was at an end; but be that as it may, they were to be taken by the defendant immediately, and it was quite accidental if they derived any further advantage from being in the land." And Bayley, J., remarked in a concurring opinion, that the land was a mere warehouse.

Warwick v. Bruce, 2 M. & S. 205 (1813), was a case which differed from *Parker v. Staniland* only in that the potatoes were not mature, and on this ground counsel attempted to distinguish it, arguing that *Emmerson v. Heelis* and *Crosby v. Wadsworth* had gone on this very distinction; but Lord Ellenborough remarked that if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit out of the growing surface, it would be for an interest in land, and would unquestionably fall within the range of *Crosby v. Wadsworth*. But that here was a contract for potatoes at so much per acre, and that, therefore, it fell within the case of *Parker v. Staniland*.

In *Mayfield v. Wadsley*, 3 B. & C. 357 (1824), the contract was by an incoming tenant to pay the outgoing one for the crop of wheat that had been sown by the latter. The contract was partly executed. Abbott, C. J., was of the opinion that even if the plaintiff could not recover on account of the Statute of Frauds, yet he might, on a subsequent implied promise to pay for the crop of which he had taken possession. Bayley, J., held it to be a contract for crops, as such, and not for an interest in land. Holroyd, J., thought that as the contract was between *tenants*, it did not concern an interest in land; and on this ground Little Dale, J., concurred, although his own opinion, expressed as he said with some diffidence, was that the contract concerned an interest in land, because made at the same time as a sale of the land itself. "Crops of corn," he said, "may be sold under a *fi. fa.*, but although crops are separately valued, yet if they are transferred with the land, the party takes them as part of the land."

(k) 5 B. & C. 829.

(l) What vestures are included in the term *fructus industriales*, and what not, must be determined. The distinction arose from a feeling that a tenant ought not to be deprived of the immediate result of his labor on account of a determination of the estate unforeseen to him. The distinction being drawn between tenant and landlord was extended to executor and heir, and afterwards applied in construing the

This *natural* distinction, which was recognized before the Statute of Frauds was passed, and which was here applied in the construction of that statute, has ever since been followed. And al-

Statute of Frauds. Emblements are the profits of the land sown; the immediate fruits of industry (*fructus industriales*). But agriculture in this day embraces nearly all growths, and, except the primeval forests and prairie grass of new countries, no vestures escape the care of the husbandman. In England and in some of our older States the forests consist of planted trees, and the pasture and meadow of cultivated grass. In the recent case of *Marshall v. Green*, 1 C. P. D. 39, Lord Coleridge, C. J., remarked that planted trees could not in strictness be said to be produced spontaneously, yet the labor employed in their planting bore so small a proportion to their natural growth, that they could not be considered as *fructus industriales*. Nursery trees, however, are chattels, not being part of the land, but as it were stored in it until they should be sold; *Miller v. Baker*, 1 Metc. (Mass.) 27. *Whitmarsh v. Walker*, 1 id., 314; *Adams v. Smith*, Breese, 221. But fruit trees not in a nursery are really just as other trees; *Adams v. Smith*, *supra*. The case of *Robbins v. McKnight*, 1 Halst. Ch. 229, illustrates well this point. It was held where the trees of A. were planted in the land of B. under an oral agreement to divide the profits, that the trees became part of the land, and the legal title vested exclusively in B. In *Reiff v. Reiff*, 64 Pa. St. 134, the subject receives scholarly treatment at the hands of one who was also a practical farmer. From this opinion it can be gathered that *annual* products, those which in the ordinary course of things return the labor and expense bestowed upon them within the current year, are emblements. When cut the

root dies. Clover does not mature till the second year, nor timothy till the third; and if these were allowed as emblements the first year, why could not the former tenant claim the second crop, and so on till the root were exhausted? And see *Evans v. Iglehart*, 6 G. & J. 183, and *Brittain v. McKay*, 1 Ired. 268 and note, as laying down the same rule. *Fructus industriales* may then be said to be synonymous with the term emblements, or, to carry the definition to greater precision, annual products.

Hops form an exception to the rule. It is true that in *Waddington v. Bristow*, they were said to be an interest in land by two of the judges; but it was remarked by Parke, B., during the argument in *Rodwell v. Phillips*, 9 M. & W. 503, that hops were *fructus industriales*, and that *Waddington v. Bristow* would now probably be decided differently. This subject was discussed somewhat at length in *Frank v. Harrington*, 36 Barb. 415. The judge relied mainly on the case of *Latham v. Atwood* (Croke Charles, 515) and the reasoning there used. An anonymous case in 2 Freeman, 210, was also cited, and a passage from 9 Viner, 372, pl. 77, quoted, to the effect that hops growing out of old roots shall go to the personal representative "because they grow by the manurance and industry of the owner," and so are emblements. The same point is ruled in *Warren v. Winne*, 2 Lans. 209.

In *Lewis v. McNatt*, 65 N. C. 65, it was held that crude turpentine remaining on the tree, and known as scrape, was *fructus industrialis*. But fruit as a general thing is considered realty. *Rodwell v. Phillips*, 9 M. & W. 501.

though some of the nice distinctions which were made prior to *Evans v. Roberts* have since found a place in the mind of the court and an expression in the decisions, they do not in any sense take the place of this general rule, but are subordinate to it, being applied to one division or the other separately, and never indiscriminately to all vegetable growths. In attempting to discover the present state of the law, we will rely chiefly on this distinction, treating each division separately, and noting any irregularities due to the character of the contract or the peculiar circumstances of particular cases.

§ 708. The distinction between *fructus industriales* and *fructus naturales* has been followed in this country as well as in England, and we can therefore assert with some confidence that annual crops are considered personal property, and as such may be taken in execution under a *fi. fa.*, or sold orally.(m)

Fructus industriales are personalty.

Growing crops are under some circumstances treated as if part of the realty, as, where they have been planted by the owner of the soil. In such a case they will pass to the vendee of the land; but the owner of the soil may sell a crop to be cut without conveying any interest in the land, and the purchaser will acquire title to it as a chattel, even though not fit for harvest at the time of the sale. It was formerly held that any reservation must be included in the deed, lest the rule be violated which protects written evidence from oral. The modern tendency, however, seems to be to consider a parol reservation as part of the consideration, and as such valid.(n)

(m) *Davis v. McFarlane*, 37 Cal. 636; *B. O. S.* 588; *Hogan v. Berry*, 24 U. Northern v. The State, 1 Carter (Ind.), C. Q. B. 348. The case of *Hollis v. Morris*, 2 Harrington (Del.), 3, has a *dictum* to the contrary effect, but as in that case the contract was fully executed the question did not arise.

(n) The following cases held a writing to be necessary: *Powell v. Rich*, 41 Ill. 466; *Johnson v. Tantlinger*, 31 Iowa, 502; *Brown v. Thurstin*, 56 Me. 127; *Vanderkarr v. Thompson*, 19 Mich. 86; *McIlvaine v. Harris*, 20 Mo. 458; and see *Austin v. Sawyer*, 9 Cow. 39. On this principle alone can we explain the ground taken by the court in *Earl of Falmouth v. Thomas*, 1 Cr. & M. 106.

As has been said, *fructus industriales* are personal property. The older cases preceding *Evans v. Roberts* made maturity a test, or reckoned the subject-matter of the contract realty or personalty, according as vendee or vendor was to sever it from the ground. After the general rule was once laid down these nicer distinctions were overlooked, and it may be stated generally and without qualification, that at the present day both in England and America a contract for the sale of growing crops produced annually by labor and the cultivation of the earth, and which are included within the meaning of the term "emblemments," is not a contract for the sale of land, or any interest in or concerning it, and that it is not material whether they have come to maturity or not at the time of the sale, or whether they are to be cut and taken off the ground by the vendor or vendee.(o)

The land on which was a nearly matured crop was let for fourteen years. There was a verbal agreement that there should be an extra compensation for these crops, which the lessor attempted to enforce. The defendant pleaded that the crops, &c., were not excepted or reserved out of the letting or agreement to let, and that there was no agreement in writing in those causes of action. On demurrer the plea was sustained, the court resting their decision on the Statute of Frauds. But would not the decision have been the same had there been no Statute of Frauds? In Pennsylvania the contrary is firmly established; the law being that growing crops are personalty, but so far partake of the nature of realty as to pass with it unless expressly reserved, a parol reservation being sufficient. *Lauchner v. Rex*, 20 Pa. St. 468; *Backenstoss v. Stahler*, 33 id. 254. See also on this side of the question, *M'Ginness v. Kennedy*, 29 U. C. Q. B. 95; *Sherman v. Willett*, 42 N. Y. 150; *Carson v. Browder*, 2 Lea (Tenn.), 702; *Walton v. Jordan*, 65 N. Car. 172; *Youmans v. Caldwell*, 4 Ohio St. 79; *Heavilon v. Heavilon*, 29 Ind. 512; *Hisey v. Troutman*, 84 id. 115, and *Harvey v. Million*, 67 id. 92, overrul-

ing *Chapman v. Long*, 10 id. 465, and *Turner v. Cool*, 23 id. 58. In Ohio crops do not pass by a judicial sale, but remain with the defendant, because the determination of the estate was unforeseen to him; *Cassilly v. Rhodes*, 12 Ohio, 88; but this is not the law generally. In Pennsylvania it has been recently decided that on a judicial sale the crops pass to the sheriff's vendee. In this case the one in possession was tenant on shares, and the landlord's share had been previously sold on a *fi. fa.*; but as his share had not then been severed, it was held there was nothing to sell, and the crop went with the land on the subsequent sale; *Long v. Seavers*, 13 W. N. C. 428. In some of the States maturity has been made a test where the question of the character of the crops arose between vendor and vendee. In Iowa, and possibly Illinois, it has been decided that mature crops do not pass on a sale, but in Michigan the contrary is directly ruled; *Hecht v. Dettman*, 56 Iowa, 679; *Powell v. Rich*, 41 Ill. 466; *Tripp v. Hascig*, 20 Mich. 254. See articles *Southern Law Rev.* Oct. 1882, p. 349, and 10 Alb. L. J. 272, and 20 Am. L. Reg. N. S. 615.

(o) *Dunne v. Ferguson*, 1 Hayes, 542;

§ 709. Under the decision in *Evans v. Roberts* *fructus naturales* were brought within the provisions of the Statute of Frauds as being an interest in land. The same view had been taken a few years before in the Common Pleas, but the statement had no weight as authority, the contract having been fully executed, so that the Statute of Frauds did not enter into the determination of the case.^(p) But in *Scorell v. Boxall*^(q) the point was squarely ruled, and growing trees held to be an interest in land on the ground of the distinction taken in *Evans v. Roberts*; and the case reported by Lord Raymond was distinctly repudiated. In *Carrington v. Roots* and *Rodwell v. Phillips* this ruling was followed, the one case concerning growing grass and the other pears.^(r)

§ 710. It may then be stated as a general rule that a sale of *fructus naturales* is within the Statute of Frauds. But the exceptions due to the conditions of the sale are numerous and must be carefully noted.

First. Who is to sever the product from the soil? "Certainly," says Rolfe, B., in *Washbourn v. Burrows*,^(r') "when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the latter acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

Second. When is the severance to take place? In *Marshall v. Green*,^(s) Lord Chief Justice Coleridge said: "Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber."

Jones v. Flint, 10 A. & E. 753; *Davis v. McFarlane*, 37 Cal. 634; *Graff v. Fitch*, 58 Ill. 377; *Ross v. Welch*, 11 Gray, 235; *Bloom v. Welch*, 3 Dutch. 180; *Carson v. Browder*, 2 Lea, 702; *Buck v. Pickwell*, 27 Vt. 163.

^(q) 1 Y. & J. 396 (1827).

^(r) *Carrington v. Roots*, 2 M. & W. 254 (1837); *Rodwell v. Phillips*, 9 M. & W. 501 (1842).

^(r') 1 W. H. & G. 115.

^(s) 1 C. P. D. 39.

^(p) *Teal v. Auty*, 4 Moore, 542.

Third. How is the subject-matter measured? If by any standard applied exclusively to chattels, the court will hold the parties to their original agreement as one for personal property and not for land. This case commonly arises where standing timber is sold at so much per cord or saw-log, or fruit at so much per barrel. In *Smith v. Surman* the point arose, and Bayley, J., said: "The contract was not for the growing trees but for the timber at so much per foot; i. e., the produce of the trees when they should be cut down and severed from the freehold."(*s'*)

§ 711. Such, then, in general is the standing of the law in England at the present day.

In this country the courts have adhered more directly to the division furnished by nature, and the exceptions due to the conditions of the sale, as a general thing, receive less consideration. There is not, however, entire harmony, and two classes must be made. In the larger the burden of proof is put upon the one wishing to show the contract one for chattels only. In the other the contract will be enforced though oral, unless it directly appear that an interest or use in the land is contracted for.

The first division embraces New York, New Hampshire, Vermont, New Jersey, Pennsylvania, Delaware, Mississippi, Tennessee, Indiana, Michigan, and probably other States. The law as followed in these States is practically this, that trees, grass, and the like, being such an interest in land as would pass to the heir, are also such an interest in land as is meant by the Statute of Frauds. To rebut this presumption, it must be conclusively shown from the contract that the parties were really contracting for chattels only.

If the trees are to be cut by the vendor the presumption is a strong one, or I may say conclusive, that the vendee has only contracted for chattels. If the trees, for instance, are sold at so much per cord or saw-log, it creates an almost conclusive presumption in favor of personalty. The question of the time of severance is also of some importance. Thus where the trees were sold by the saw-log, but need not be cut for twenty years, this latter condition of the

(*s'*) *Smith v. Surman*, 9 B. & C. 561. the one to cut down the trees, the contract would not be for an interest in land. In this case the severance was also to be made by vendor, but Littledale, J., remarked that even if the vendee were

sale was sufficient to rebut the presumption arising from the way in which the subject-matter was to be measured, and the contract was held to be for realty. In Pennsylvania more stress is laid upon the time of severance than in the other States of this class, and in *McClintock's Appeal* this was made the test point of the case; but that the law of Pennsylvania primarily depends upon the character of the product will appear from the ground taken in *Pattison's Appeal* and other cases cited in the note.(t)

The other class, relying principally on the terms of the contract, includes Maine, Maryland, and probably Kentucky and Connecticut. The decisions in these States rely mainly on a paragraph in *Greenleaf on Evidence*, and most of them were decided before the rule of *Evans v. Roberts* became affirmed and generally received. The law in these States is that a sale of trees, grass, and the like, is not a sale of real estate, unless it is contemplated that they shall remain so as to receive profit and growth from the growing surface of the land.(u)

There seems to be a difference of opinion as to what is the law in Massachusetts. In *Kingsley v. Holbrook* the court mentioned it as one of the States which followed *Greenleaf on Evidence*, and

(t) *Scotten v. Brown*, 4 Harr. (Del.) 324; *Owens v. Lewis*, 46 Ind. 488; *Terrill v. Frazier*, 79 id. 473; *Russell v. Myers*, 32 Mich. 523; *Haskell v. Ayers*, 35 id. 89; *Harrell v. Miller*, 35 Miss. 700; *Kingsley v. Holbrook*, 45 N. H. 318; *Slocum v. Seymour*, 36 N. J. L. 139; *Bank v. Crary*, 1 Barb. 542; *Goodyear v. Vosburg*, 57 id. 246; *Green v. Armstrong*, 1 Denio, 550; *Brown v. Stanclift*, 20 Alb. L. J. 55; *Killmore v. Howlett*, 48 N.Y. 569; *Pattison's App.*, 61 Pa. St. 294; *McClintock's App.*, 71 id. 366; *Wilson v. Douglass*, 10 W. N. C. 528; *Knox v. Haralson*, 2 Tenn. Ch. 236; *Buck v. Pickwell*, 27 Vt. 158; *Ellison v. Brigham*, 38 id. 66; *Cady v. Sanford*, 53 id. 632; *Chamberlain v. Smith*, 21 U. C. Q. B. 106; *McDonald v. McKay*, 18 Grant (U. C.), 103; *Ellis v. Grubb*, 3 U. C. K. B. O. S. 613; *Hamilton v. McDonnell*, 5 id. 722; *Murray v. Gilbert*, 1 Hannay, 557; *Cochran*

v. Hislop, 3 U. C. C. P. 443. See *Riddle v. Brown*, 20 Ala. 412; *Heflin v. Bingham*, 56 Ala. 574; *Anderson v. Simpson*, 21 Iowa, 399; as analogous cases. And for discussions of this subject the reader is referred to *Owens v. Lewis*, *supra*; *Kingsley v. Holbrook*, *supra*; 1 *Addison on Con.*, *163; *Story on Con.*, § 1440; *Bingham on Real Prop.* pp. 190 to 200; 1 *Hilliard on Con.* 404, § 38.

(u) *Cutler v. Pope*, 13 Me. 377; *Safford v. Annis*, 7 Greenl. 168; *Erskine v. Plummer*, 7 Greenl. 447; *Smith v. Bryan*, 5 Md. 141; *Purner v. Piercy*, 40 Md. 221; *Caine v. McGuire*, 13 B. Mon. 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Sproule v. Hopkins*, 4 Ky. L. Rep. 533; but see *Craddock v. Riddleberger*, 2 Dana, 206, as establishing a different rule. *Bostwick v. Leach*, 3 Day, 476. See also on this side *Greenleaf on Ev.*, § 271. *Chitty on Con.* 301, and *Brown on St. of F.*, §§ 235 to 257.

the Massachusetts cases were cited by counsel in *Owen v. Lewis* to sustain the same point; but in this case the court examined the cases cited, and remarked that they were fatal to the doctrine they were cited to support.

The cases really hold growing timber to be an interest in land,^(v) but a parol contract is regarded as an executory contract for the sale of chattels, as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal. The majority of the cases before the court have been those in which the license or sale had become executed and for this reason attained validity, but the court has not been careful in laying stress on this fact; on the contrary in *Clafin v. Carpenter*, relying on the anonymous case reported by Lord Raymond, it was decided that a contract for the sale of standing wood or timber, to be cut and severed from the freehold by the vendee, does not convey to him any interest in the land, within the meaning of the first section of the Statute of Frauds. The later cases, however, repudiate this *dictum*, by declaring the license given by the parol contract to be revocable either expressly or impliedly as to the trees that have not been already cut under the license.^(w)

§ 712. We have seen that even *fructus industriales* partake so nearly of the nature of realty as to pass with it, unless expressly reserved. It follows *a fortiori* that the same is true of *fructus naturales*, and in this latter case it would seem that the reservation must be in the deed.^(x)

Reservation
of *fructus
naturales*
must be in
the deed.

(v) *White v. Foster*, 102 Mass. 378; *Poor v. Oakman*, 104 Mass. 316; *Clap v. Draper*, 4 Mass. 265.

(w) *Clafin v. Carpenter*, 4 Metc. 583; *Nettleton v. Sikes*, 8 id. 34; *Giles v. Simonds*, 15 Gray, 441; *Drake v. Wells*, 11 Allen, 141. In all States (although outside of Massachusetts the principle is not carried to such an extent) a parol sale gives rise to a license which, prior to revocation, justifies the vendee in entering and taking the property. When he has once acquired a chattel interest under the license, that cannot be taken away from him by the revocation, but if he goes on felling more trees, he will be liable in trespass. The interest only

protects him as to itself, not as to the part of the contract which has not been fulfilled. The revocation can be either express or implied; a sale of the land on which the license is to be performed is an example of the latter; *Carrington v. Root*, 2 M. & W. 254; *Greeley v. Stillson*, 27 Mich. 158; *Searles v. Ogden*, 15 Rep. 562; *Brown v. Dodge*, 32 Me. 168; *Yale v. Seeley*, 15 Vt. 230; *Ellis v. Clark*, 110 Mass. 391; *Armstrong v. Lawson*, 73 Ind. 500; *Walter v. Dexter*, 34, U. C. Q. B. 426; and cases cited at the beginning of this note. *Vide post* §§ 719-721.

(x) *Jones v. Timmons*, 21 Ohio St. 604;

§ 713. Generally then, with reference to vegetable growths, it may be said that *fructus industriales* are personal property in all cases, no matter what the terms of the contract concerning them may be; the seeming exception of their passing on a sale of the land being due to their partaking so closely of the nature of realty, and the protection which the courts give to written evidence under the common-law rule. On the other hand, *fructus naturales* in most instances are realty, and this real character is only changed when the express terms of the contract concerning it show that in the contemplation of the parties the subject-matter was personalty, as where the price is reckoned by some measure applied exclusively to chattels, or where the vendee is not to get the trees until they have been changed in character by the vendor.

§ 714. We pass from the subject of natural fixtures to what we may call artificial ones. Where the owner of land, or one in possession under an oral agreement to purchase, erects a building it becomes part of the freehold, and passes with the land unless expressly reserved *in the deed*.^(y) Or if the building is sold separately the sale is within the Statute of Frauds, and must be in writing ^(z)

The Statute of Frauds has, however, no effect on the doctrine of conversion, and as between several claimants from a common grantor, an agreement to give the character of realty or personalty to certain fixtures may be proved by parol.^(a) When the buildings have once been severed by being separately sold, they pass to the purchaser and become in his hands personal property.^(b)

Hewett v. Isham, 7 Exch. 79; Knotts v. Hydrick, 12 Rich. 318; and the rule is the same as to dead and down timber, for dead timber may be standing in the soil, and down timber may be growing in it; Cockrill v. Downey, 4 Kan. 429.

(y) Landon v. Platt, 34 Conn. 521; Smith v. Odom, 63 Ga. 502; Fenlason v. Rackliffe, 50 Me. 363; Noble v. Bosworth, 19 Pick. 314; Poor v. Oakman, 104 Mass. 315; Whitaker v. Cawthorne, 3 Dev. (N. Car.) 389; Bond v. Coke, 71 N. Car. 99; Hutchins v. Masterson, 46 Tex. 555.

(z) Meyers v. Schemp, 67 Ill. 471. In this case the building had been destroyed by fire, and it was the bricks remaining in the walls and surrounding debris that were sold, and still the rule as laid down in the text was applied. See Rogers v. Gillinger, 30 Pa. St. 185. In Russell v. Richards, 1 Fairf. 429, a saw-mill was sold by parol, the court holding that in that region it was a mere trade fixture.

(a) Frederick v. Devo1, 15 Ind. 359.

(b) Shaw v. Carbrey, 13 Allen, 464.

§ 715. Where buildings are put on the land by one having no claim of title to the property, the rule must be differently stated. The basis of the law, both now and formerly, has been the intention. When the building or chattel once becomes affixed, the question of the intention arises. The change in the law on this point has been a change in the interpretation of the intention of the builder rather than the adoption of a new test. Formerly the character of the building was supposed to show forth the intention of the builder; and a structure with a stone foundation might be held realty, while one resting merely on props or stakes would be allowed to the tenant.

Intention of
builder de-
termines
character of
building.

Gradually other considerations began to influence the court in its attempt to get at the intention of the builder, and the favoring of trade as well as the leaning of the courts towards the tenant have gained so much that it may now be stated as a general rule that buildings erected by the tenant are personal property. This cannot, however, be taken without any exceptions, and the safer statement is that the intention governs; the court being aided in determining the intention by three considerations: The policy of the law, the relation of the parties, and common usage.^(b')

1. The law favors trade, and chattels affixed for trade purposes are allowed to remain chattels.^(c) 2. As between creditor and debtor, life tenant, and remainder-man or reversioner, tenant and landlord, the law in each case favors the former, which leaning it is easily seen tends to preserve the personal quality of chattels affixed by others than the owners of the property.^(d) 3. By common usage a door key is realty, and in Philadelphia at least gas fixtures are personal property.^(e) It follows from the personal character of a tenant's fixtures that they may be sold by parol prior to the tenant's leaving the premises, or may be taken by the tenant; but after giving up his possession he cannot re-enter and take them.^(f)

As a general rule it may be stated that the real or personal char-

(b') Lectures by Prof. E. C. Mitchell, Law Dept. Univ. of Pa.

(c) *Elwes v. Mawe*, 2 Sm. Lead. Cas. 177 and notes; *Petrie v. Dawson*, 2 Car. & Kir. 138.

(d) *Hey v. Bruner*, 61 Pa. St. 87.

(e) *Jarechi v. Philharmonic Society*,

79 Pa. St. 403; and see *Russell v. Richards*, 1 Fairf. 429; *vide* Co. Litt. 18 b.

(f) *Walton v. Jarvis*, 13 U. C. Q. B. 620; *Hallen v. Runder*, 1 Cr. M. & Ros. 274; *Malsbury v. Tucker*, 3 Vic. L. Rep. 213; *Lee v. Gaskell*, L. R. 1 Q. B. 700.

acter of the buildings depends on whether they were put up by the landowner or his tenant. Accordingly, a contract by the landlord to put improvements on his property, must be in writing as concerning an interest in land, but a permission to the tenant to make improvements, or any contract concerning improvements so made, only concerns personalty, and may be by parol.(g)

A promise by the landlord to pay tenant for buildings to be put up by the latter is likewise not within the statute, and may be enforced if made by parol. But where one in wrongful possession makes improvements, a promise by the owner of the land to compensate him is void, not on account of the Statute of Frauds, but because *nudum pactum*. In Alabama, however, there is a contrary ruling.(h) It follows directly from this that the right to be paid for improvements put upon the land of another is a mere personal right, and may be assigned by parol.(i)

§ 716. Church pews and burial lots are a species of property about which there is much confusion. The owner has Church pews, burial lots, &c. a right to the full enjoyment or use of the pew as long as the church is occupied for divine service. If the church is destroyed by fire, or falls into dilapidation, he has no remedy against the society, and no right in a new edifice if one is built. It is a question for the jury whether the removal or extensive repairing of a church was necessary, and in case they find that it was not, some cases hold that damages can be recovered. In England it is in the nature of an heirloom and stays in the family; in this country it has been held to go to the personal representative. In Massachusetts, New Hampshire, Vermont, Maryland, Louisiana, and New York it seems to be established that the right is real estate, and in the last-mentioned State it is said that a transfer of it for more than a year must be in writing; but the decisions in

(g) *Griffiths v. Jenkins*, 10 Jur. N. S. 207; *Mann v. Nunn*, 43 L. J. C. P. 241; *Carter v. Salmon*, 43 L. T. Rep. N. S. 490; *Yater v. Mullen*, 23 Ind. 564; *O'Leary v. Delaney*, 63 Me. 584; *Banghart v. Flummerfelt*, 43 N. J. Law, 31; *Dubois v. Kelly*, 10 Barb. 507.

(h) *Foley v. Connolly*, 5 Ir. Jur. (N. S.) 312; *Sutton v. Sears*, 10 Ind. 224; *Powell v. McCahan*, 28 Mo. 70; *Benedict v. Beebe*, 11 Johns. 145; *School District of Wilkins Tp. v. Milligan*, 88 Pa. St. 99. Where made by one in wrongful possession, *Frear v. Hardenberg*, 5 Johns. 271; *Cassell v. Collins*, 23 Ala. 676.

(i) *Lombard v. Ruggles*, 9 Me. 67; *Griggs v. Seeley*, 8 Ind. 269; *Zickaposse v. Hulick*, 1 Morris (Iowa), 177.

that State are far from being uniform. In Pennsylvania it has been said that although the right partakes of the nature of real estate, yet it is so conditional that it cannot be called real estate, and must necessarily pass to the personal representative.

The law concerning burial lots is quite similar, and the cases under each head are cited as authority in determining questions arising under the other; but the tendency is stronger in this latter case to regard the right as real estate. The sentiment is sound and has the sanction of mankind in all ages, which regards the resting-place of the dead as hallowed ground, not subject to the laws of ordinary property nor liable to be devoted to common uses.(j)

The right to compensation from one building against a party-wall is now generally held to be realty, the courts being driven to this view by expediency, or, as in Pennsylvania, the matter being fixed by the legislature.(k)

§ 717. We have seen that a building or fixture of any kind upon the land of another is personal property; we have next to consider the *right* to put the building there, and this right, we shall see, is considered in the law more substantial than the structure built in pursuance of it, and is protected by the statute, while the corporeal evidence or outgrowth of the right can be transferred from this one to that one by parol.(l) A leasehold interest in lands is embraced by the provisions of the land clause of the English Statute of Frauds. The subject, however, forms a distinct topic, and is treated in the next chapter.(m)

SECOND,
what inter-
ests in land
are within
the statute?

§ 718. Where one in possession of land grants a right to another to build on it and receives rent therefor, the right so granted is an easement and can only be assigned

Easements.

(j) See article in 19 Am. L. Reg., pp. 1 and 65; Kincaid's App., 66 Pa. St. 420; Church v. Wells' Ex'ors, 24 id. 249; Church v. Bigelow, 16 Wend. 28; *In re* Church, 3 Ed. Ch. 155; Judge Ruggles' report as to burial rights, 4 Brad. Sur. Rep. 522; Kimball v. Parish, 24 Pick. 349; Kellogg v. Dickinson, 18 Vt. 266. And as to English law—Cripps' Law of the Church and Clergy, chapters on "Seats and Pews in Churches," and "Church Yards;" and Baker on Burial.

(k) Rodier v. Sait, 1 Low. Can. L. Jour. 70; Pa. Act April 10th, 1849; Knight v. Beenken, 30 Pa. St. 372.

(l) Trammel v. Trammel, 11 Rich. (S. C.) 474; Houghtaling v. Houghtaling, 5 Barb. 383; Mumford v. Whitney, 15 Wend. 386; Duncan v. Labouisse, 9 La. Ann. 50.

(m) See chap. XXXIV. See also Cocking v. Ward, 1 C. B. 867; *Ex parte* Hall, *In re* Whitting, 10 Ch. D. 619; Judge v. Cash, 5 Ky. L. J. & R. 514.

by deed.(n) But a mere parol license to this effect creates only a tenancy at will.(o)

It would seem that it is the reservation of the rent that changes what would otherwise be a license into an easement, at the same time changing personal property into realty. This is the reasoning used in *Cayuga Railroad v. Niles*, just cited, and the cases in which no rent is reserved present an unbroken front in favor of personalty.(p)

A permanent right of whatever kind upon the land of another is within the Statute of Frauds, and can only be created by deed.(q) Its transfer is under like restrictions,(r) subject, however, to a few seeming exceptions. Thus where a deed has a clause granting appurtenant easements, parol evidence is sometimes admissible to show the existence of a way appertaining to the land;(s) and it has been held that where at the time of the sale of land the vendor assured the purchaser that an alley was to remain open, he was bound by his representations, and the right to the alley could be established by parol evidence, not as contradicting the deed, but as forming part of the consideration of the sale.(t)

This doctrine has, however, met with but little favor, and in New Hampshire, in deciding this point, the court said that where the terms of a deed are not ambiguous, and the extent of the rights of the parties under the deed are plain and evident, to hold that a parol agreement shall in fact enlarge the rights of either party beyond those given by the deed, under the name of conclusive

(n) *Cayuga R. R. v. Niles*, 13 Hun, 172.

(o) *Couch v. Burke*, 2 Hill (S. Car.), 535.

(p) *Spencer v. Darlington*, 74 Pa. St. 293; *Smith v. Jenks*, 1 Denio, 582; *Lapham v. Norton*, 71 Me. 88; *Prince v. Case*, 10 Conn. 378; *Curtiss v. Hoyt*, 19 id. 166; *Keyser v. The School District*, 85 N. H. 480; *District of Corwin v. Moorehead*, 43 Iowa, 466.

(q) As to cases of flowage see *Thompson v. Gregory*, 4 Johns. 83; *Banghart v. Flummerfelt*, 43 N. J. Law, 28; *Tanner v. Volentine*, 75 Ill. 628; *Clute v. Carr*, 20 Wis. 533; *Cook v. Pridgen*, 45 Ga. 339. As to cases of ways see

Clyde v. Clyde, 1 Yeates, 92; *Pitkin v. L. I. R. R.*, 2 Barb. Ch. 230; *Richter v. Irvin*, 28 Ind. 27; *Butt v. Napier*, 14 Bush, 42; *Hall v. McLeod*, 2 Metc. (Ky.) 104; *Bloomstein v. Clee*, 3 Tenn. Ch. 439; *Ferrell v. Ferrell*, 1 Baxt. 333.

(r) *Cocker v. Cowper*, 1 Cr. M. & Ros. 421; *Bullen v. Runnels*, 2 N. H. 262; *Collam v. Hocker*, 1 Rawle, 111; *Mills v. Hopkins*, 6 U. C. C. P. 141.

(s) *Brown v. Berry*, 6 Coldw. 102; but see *Green v. Collins*, 13 N. Y. Week. Dig. (N. S.) 179.

(t) *Truehart v. Price*, 2 Munf. 271; *Puttman v. Haltey*, 24 Iowa, 425; *Bedinger v. Whittamore*, 2 J. J. Marsh. 553.

evidence, is nothing more or less than to give such parol agreement the effect of a grant of real estate. A doctrine having any such effect is in direct contravention of the Statute of Frauds, and cannot be sustained.(u)

The extinguishment of an easement may be by parol, but only by such decisive acts of the party beneficially interested as will be considered by the law as an abandonment of it.(v) In a word, it may be said that all incorporeal hereditaments are such an interest in land as is included within the Statute of Frauds.(w)

§ 719. It is necessary, before leaving this subject, to examine the law respecting licenses as they affect land, and if possible discover and settle the line of distinction between ^{Licenses.} an easement or privilege in land which must be proved by deed or presumed grant, and a license which may be proved by parol; a distinction which the learned Chancellor Kent significantly denominates "quite subtle."(x)

A license must also be distinguished from a lease. Thus, if A. gives B. a right to go upon his land to do some particular act, the right granted is a mere personal privilege, and confers no interest in the land. This doctrine is, however, applicable only to a *temporary* occupation of the land. And if A. agrees with B. that he may enter upon his land and occupy it for a year, this is not properly speaking a license merely, it is more—it is a lease; and if no time be specified in the agreement, it is an estate at will.(y)

A license is essentially an authority or power, and is therefore governed by the rules which are incident to the nature of powers

(u) *Carleton v. Redington*, 21 N. H. 301; *Tryon v. Mooney*, 9 Johns. 358.

(v) *Corning v. Gould*, 16 Wend. 542; *Curtis v. Noonan*, 10 Allen, 406.

(w) *Bugg & Nelson v. Woodward*, Cro. Eliz. 188, 249; *Eaton v. Sherwin*, Skin. 113; *West v. Sutton*, 2 Ld. Ray. 853; *Paynton v. Kirkby*, 2 Chitty, Rep. 406; *Bishop of Salisbury v. Philips*, 1 Ld. Ray. 535; *Winn v. Murehead*, 52 Iowa, 64. In the case of advowsons it is the granting of the advowson, not the exercise of the right of presentation, that is within the statute; *Anon.*, 16

Viner, Abr. p. 199, pl. 31; *King v. Eriswell*, 3 T. R. 723. In *Stafford v. Buckley*, 2 Ves. Sr. 177, the Lord Chancellor held an annuity charged on duties levied in Barbadoes not an interest in land within the Statute of Frauds; and see Co. Litt. 20 a, note 4.

(z) *Seymour v. Carter*, 2 Metc. 520; *Lee v. Meeker*, 2 Wis. 491; *Morrill v. Mackman*, 24 Mich. 282; *Rathbone v. McConnell*, 21 N. Y. 466; *Davis v. Townsend*, 10 Barb. 343.

(y) *Mumford v. Whitney*, 15 Wend. 392; *Branch v. Doane*, 17 Conn. 402.

and regulate their exercise.(z) It is not within the provisions of the Statute of Frauds protecting interests in land,(a) and may be created as well by parol as by a writing under seal.(b) It is in its very nature revocable, but prior to revocation the licensee is not a trespasser,(c) and it has been held that he has such an interest as is subject to levy; at least where the licensor was the vendee under the execution, the licensee was not permitted to set up his claim against him.(d)

§ 720. The naked license, though revocable at the will of the
Licenses
coupled
with inter-
ests. licensor, becomes changed in its character when coupled with an interest, and the licensor cannot, upon the principle of equitable estoppel, do any act to deprive his licensee of property acquired by him under the license. This doctrine standing by itself is so apparent and so universally supported by authorities, that to cite them would seem pedantic. But when this doctrine comes in conflict with the provisions thrown around title to land, to protect it from the fraud or at best the uncertainty of parol evidence, questions arise which are at once important and difficult, and which have been variously answered by the courts.

In Pennsylvania the leading case of *Rerick v. Kern* has settled the law; and an executed license, that is, one which has an interest coupled with it, is held to fall within the principle on which equity decrees specific performance of agreements which are substantiated by an actual change of possession, and when recovery

(z) 2 Am. Lead'g. Cases, 736, and cases cited.

(a) *Russell v. Hubbard*, 59 Ill. 340; *McLarney v. Pettigrew*, 3 E. D. Smith, 111; *Erskine v. Plummer*, 7 Greenl. 451; *New Brunswick &c. Co. v. Kirk*, 1 Allen (N. B.), 449.

(b) Licenses which really grant easements must be by deed, as for instance a right to mine; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 322; *Kamphouse v. Gaffner*, 73 Ill. 460; *Anderson v. Simpson*, 21 Iowa, 401; but a license to enter a theatre for twenty-one years does not require a writing, not being an interest in land, and may be

revoked; *Taylor v. Waters*, 7 Taunton, 383; *McCrea v. Marsh*, 12 Gray, 211.

(c) *Riddle v. Brown*, 20 Ala. 412; *Wynne v. Garland*, 19 Ark. 33; *Woodward v. Seely*, 17 Ill. 164; *Long v. Buchanan*, 27 Md. 516; *Wells v. Banister*, 4 Mass. 514; *Nettleton v. Sikes*, 8 Metc. 35; *Millerd v. Reeves*, 1 Mich. 110; *New Orleans R. R. v. Moya*, 39 Miss. 386; *Jamison v. Milleman*, 3 Duer, 258; *Pierrepont v. Barnard*, 6 N. Y. 289; *Merrill v. Blodgett*, 34 Vt. 480.

(d) *Kellogg v. Kellogg*, 6 Barb. 127; and see *Bennett v. Scutt*, 18 Barb. 348.

in damages would be inadequate to the purposes of justice; and this, notwithstanding the apparent inconsistency of the relief thus given with the rules of the common law and the provisions of the Statute of Frauds.

It must be remembered that the courts of Pennsylvania, at the time this decision was rendered, though administering justice through common-law forms, were nevertheless clothed with many of the powers exclusively exercised by chancery in districts where the two jurisdictions were distinct; and it has been doubted whether this case can be considered as authority in a strictly legal tribunal.

But the case has nevertheless been followed in some of the other States by courts of law, and may be considered as good doctrine in all courts of equity. But even where specific performance is not decreed, the licensor is compelled to pay the licensee for work done or interests acquired under the license, and as the value of the work or interests cannot in many cases be estimated with any degree of approximation, the tendency seems to be to enforce the license specifically.^(e)

The weight of authority in courts of law is nevertheless contrary to the view taken in *Rerick v. Kern*, and it is held that though the license might operate as an excuse for acts of a temporary or transient character, it could not be pleaded as a justification for the permanent occupation of land.^(f)

A nice distinction is sometimes drawn between the creation and extinguishment of an easement by a parol license, and the latter, if the license is executed, is held good. As where a parol license is granted by the owner of the dominant tenement and executed upon the servient tenement. This doctrine is sanctioned by Lord Ellenborough

(e) *Liggins v. Inge*, 7 Bing. 682; *Cook v. Pridgen*, 45 Ga. 331; *Petty v. Kenyon*, 49 id. 469; *Lane v. Miller*, 27 Ind. 536; *Simons v. Morehouse*, 88 id. 391; *McCrackin v. Sanders*, 4 Bibb, 511; *Dillon v. Crook*, 11 Bush, 325; *Ricker v. Kelly*, 1 Me. 117; *Clement v. Durgin*, 5 id. 9; *Baker v. C. R. I. & P. R. R.*, 57 Mo. 265; *Lee v. McLeod*, 12 Nev. 284; *Ameriscoggin Bridge v. Bragg*, 11 N.H. 109; *Sampson v. Burnside*, 13 id. 266; *Houston v. Laffee*, 46 id. 505; *Trenton Water Co. v.*

Chambers, 1 Stockt. 475; *Wilson v. Chalfant*, 15 Ohio, 247.

(f) *Foot v. New Haven Co.*, 23 Conn. 227; *Cook v. Stearnes*, 11 Mass. 533; *Morse v. Copeland*, 2 Gray, 304; *Curtis v. Noonan*, 10 Allen, 409; *Mumford v. Whitney*, 15 Wend. 380; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Hazleton v. Putnam*, 3 Chand. (Wis.) 120; *Clute v. Carr*, 20 Wis. 531; and generally cases cited in note to *Prince v. Case* (10 Conn.

in *Winter v. Brockwell*,^(g) and has a considerable following in this country. The doctrine of *Rerick v. Kern* is a reasonable outgrowth of this principle, but when courts reject the one and adopt the other, they are relying on a distinction so refined as to be practically lost.^(h)

It is, however, generally held, in direct opposition to this view, that a promise by one not to build his house farther front than a certain line is within the statute, though where there is a mutual promise to that effect performance by one will make the promise binding on the other. And this conclusion is arrived at without any reliance on the doctrine of dedication to the public; but it is said the owner holds the land subject to the restriction of not building upon a part of it.⁽ⁱ⁾

§ 721. The revocation of a parol license may, of course, be by parol (when no interest is coupled with it), and part performance is no bar to such revocation if the interest given by such part performance has been wholly enjoyed. Thus, where one under an oral license has cut and removed trees, he gains thereby no right to cut and remove others if in the meantime the license is revoked.^(j) The revocation may also be implied, as by a subsequent transfer of either the dominant or servient tenement, whether it be by conveyance *inter vivos*, or by descent upon the death of either licensor or licensee.^(k)

378), and *Rerick v. Kern* (14 S. & R. 267), 2 Am. Ldg. Cases, 759.

(g) 8 East, 308.

(h) *Dyer v. Sanford*, 9 Metc. 395; *Morse v. Copeland*, 2 Gray, 304; *Curtis v. Noonan*, 10 Allen, 409; *Lane v. Miller*, 27 Ind. 536; *Taylor v. Hampton*, 4 McCord, 96; *Corning v. Gould*, 16 Wend. 542.

(i) *Wolfe v. Frost*, 4 Sandf. Ch. 90; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Rice v. Roberts*, 24 Wis. 464.

(j) *Wakeley v. Froggatt*, 2 H. & C. 674; *Giles v. Simonds*, 15 Gray, 441; *Owens v. Field*, 12 Allen, 457; *Marsh v. Bellew*, 45 Wis. 49.

(k) *Perry v. Fitzhowe*, 8 Ad. & E. (N. S.) 777; *Prince v. Case*, 2 Am. Ldg. Cases, 728; *Foot v. New Haven*

Co., 23 Conn. 227; *Pool v. Lewis*, 41 Ga. 170; *Seidensparger v. Spear*, 17 Me. 126; *Stevens v. Stevens*, 11 Metc. 254; *Fabian v. Collins*, 3 Mont. 216; *Putney v. Day*, 6 N. H. 431; *Thompson v. Gregory*, 4 Johns. 83. But if assignee of servient tenement lets licensee proceed with his work under the license, he may be estopped; *Masterson v. West End R. R.*, 72 Mo. 342. The case of *Lobdell v. Hall*, 3 Nev. 517, is in conflict with the principle contended for in the text. The plaintiffs were locators upon a stream, and the defendants subsequently located a tract further up. This tract was occupied by Indians, who objected to the location but who were bought off by parol. The upper tract had a ditch upon it which had been dis used for some time, and which the de-

§ 722. It is a well-settled principle that where one contracts to do what the law implies he will do, the provisions of the Statute of Frauds need not be complied with.^(l) But where such agreements relate to land it is no defence to say that they are in furtherance of a payment of a prior debt. That will not take them out of the Statute of Frauds.^(m)

Damages
for land
taken by
eminent
domain.

Where a right is given directly by statute this same principle is carried further, and applied to cases in which title to land may be affected. Yet, even in such a case, it is not the parol contract which affects the interest in real estate, but the statute, and the subsequent parol contract is in the nature of an assent merely or a waiver of damages. In accordance with this principle it has been held that where a statute authorizes a private road to be laid out with the consent of the owners of the land, that consent may be given by parol.⁽ⁿ⁾

In Massachusetts and Maine there are laws giving the right of flowage to mill-owners, and prescribing for the fixing of damages. It follows from the principle just stated that many contracts in those States are taken out of the statute which otherwise we would expect to see in writing; the claim for damages being a merely pecuniary one, the interest in the land being already given by the statute.^(o)

sendants repaired and used. It was held that the right was not lost by passing to the defendants, on the ground that location carried the right of the Indians. There was a dissenting opinion, in which it was held that the right was an interest in land, and did not pass by the parol agreement.

(l) *Providence Christian Union v. Elliott*, 22 Alb. Law Jour. 274, and cases cited; *Pike v. Brown*, 7 Cush. 136; *Lamb v. Tucker*, 42 Iowa, 118. But such verbal promise does not pass to an assignee without notice of it; *Miller v. Winchell*, 70 N. Y. 439.

(m) *Starin v. Newcomb*, 13 Wis. 521.

(n) *Town of Old Town v. Dooley*, 81 Ill. 258; *Cottrill v. Meyrick*, 3 Fairf. 232; *Hersey v. Packard*, 56 Maine,

401; *Fuller v. Commissioners of Plymouth*, 15 Pick. 81; *Baker v. Braman*, 6 Hill, 48; *Sherman v. McKea*, 38 N. Y. 274; *Ballou v. Ballou*, 78 N. Y. 327; *People v. Goodwin*, 1 Selden, 573. But in such case, if the road is not opened in the manner prescribed by the act, the owner of the land is not bound by a parol agreement as to damages; *Battles v. Braintree*, 14 Vt. 352.

(o) *Clement v. Durgin*, 5 Greenl. 14; *Quinn v. Bease*, 64 Me. 368; *Smith v. Goulding*, 6 Cush. 154; *Cook v. Stearns*, 11 Mass. 539; *Short v. Woodward*, 13 Gray, 86; *Darling v. Blackstone Mfg. Co.*, 16 id. 189. Somewhat analogous is the case of *Mitchell v. Bush*, 7 Cow. 185.

A similar case arises where land is taken by the State under the right of eminent domain, or by a corporation under what amounts to a grant by the State to exercise the same right for a specified purpose, and within prescribed limits. A parol release of damages is good in either case, but it must be unequivocal in its character and have all the qualities of a contract, in order to be sustained. Failing in these particulars it will be set aside.^(p) Such an adjustment of damages is good only between the original parties, and does not bar the claim of a subsequent owner of the land.^(q) Nor is the vendee bound, even if he have notice, unless the original agreement were under seal, in which case it would run with the land.^(r)

§ 723. The statute embraces equitable estates as well as legal, and they can only be created or assigned by a writing. It has, however, been held, especially in Pennsylvania, that the surrendering of an equitable estate is not within the Statute of Frauds.^(s) A military land warrant before the patent is issued is such an equitable interest,^(t) and the same has been held in California with regard to a mechanic's lien.^(u) But a vendor's lien for purchase-money of land, not being in writing or created by contract, and being only implied in equity, may certainly be released by parol, and, according to some authorities, may be assigned in the same manner.^(v) The assignment of a judgment and agreements relating to the reconveyance, to the debtor,

^(p) *Fuller v. Plymouth*, 15 Pick. 81; *Oreg.*, 380; *Shoofstall v. Adams*, 2 Gillanders v. Rossmore, 1 Jones, Exch. 507; *East Penn. R. R. v. Schollenberger*, 54 Pa. St. 144. In Illinois such contract must be in writing by Statute; *Sheaff v. The People*, 87 Ill. 193; *Rockford R. R. v. Shunick*, 65 id. 228. But if the release attempts to do more than to give up a claim for damages, it cannot be sustained by parol; *Leviston v. Junction R. R. Co.*, 7 Ind. 597.

^(q) *Snow v. Moses*, 53 Me. 547; *Fitch v. Seymour*, 9 Metc. 466; *Cobb v. Fisher*, 121 Mass. 170.

^(r) *Craig v. Lewis*, 110 Mass. 379.

^(s) *Holmes v. Holmes*, 86 N. Car. 205; *Kelley v. Stanbery*, 13 Ohio St. 408; *Chenoweth v. Lewis*, 11 Reporter (S. C.

^(t) *Waters v. Bush*, 42 Iowa, 256; *Smith v. Jones*, 4 Ohio, 123.

^(u) *Ritter v. Stevenson*, 7 Cal. 389.

^(v) *Dryden v. Frost*, 3 M. & Cr. 673; *Magruder v. Campbell*, 40 Ala. 62; *Moshier v. Meek*, 80 Ill. 81; *Ewing v. Arthur*, 1 Humph. 537; *Dogget v. Patterson*, 18 Tex. 158. In Alabama and Texas the Statute of Frauds embraces only sales of land, and not "any interest therein." In other States, as in Massachusetts, there is no lien for purchase-

of lands sold under judicial process have also been supported when made by parol.(w)

§ 724. A mortgage viewed in every light is an interest in land and agreements to give a mortgage, and the assignment of the interests of both mortgagor and mortgagee must be in writing.(x) The right of the mortgagee may, as long as it remains a mere equitable right, be waived by parol like any other; but when after default the mortgagee becomes entitled in law to the premises, his estate is such as can only be waived or released by a writing.(y) It is likewise true that a promise to discharge a mortgage is not within the Statute of Frauds, as relating to land.(z)

Where the effect of a mortgage is accomplished without the form, the statute, looking at the spirit of the transaction, forbids its enforcement if by parol. Thus, where the vendors of the plaintiffs had obtained the property for the benefit of the defendant and promised orally to let the defendant redeem it at any time, the plaintiffs having notice of this were nevertheless allowed to recover the possession, the claim of the defendant being founded on a parol contract touching an interest in land.(a)

In fact no valid lien on land can be created by parol, nor can it be assigned in that manner. Both transactions concern an interest in land, and therefore come under the statute. In some States a lien on crops can be given by parol. In Alabama this is possible between those in privity of estate, but in that State the clause "or interest therein" is omitted from the land clause. In Arkansas the contrary is directly ruled, although a case decided at the same term says that such a lien might be sustained in equity. Generally the question is settled by statute in the different States.(b)

§ 725. A promise to pay for the temporary use of lands is not

money unless there is a writing to that effect; *Ahrend v. Odiorne*, 118 Mass. 268.

(w) *Winberry v. Koonce*, 83 N. Car. 354; *Judd v. Mosely*, 30 Iowa, 428; *Martin v. Martin*, 16 B. Mon. 8.

(x) *Brizich v. Manners*, 9 Mod. 285; *Fox v. Kimberly*, 27 Conn. 316; *Coquillard v. Suydam*, 8 Blackf. 30; *Brake v. King*, 54 Ind. 296; *Clabaugh v. Byerly*, 7 Gill, 362; *Binion v. Browning*, 26 Mo. 272; *Marble v. Marble*, 5 N. H. 376; *Castro v. Illies*, 13 Tex. 233; *Bailey*

v. Warners, 28 Vt. 92; *Clason v. Shepherd*, 6 Wis. 374; *Stoddart v. Stoddart*, 39 U. C. Q. B. 213.

(y) *Goode v. Rawlins*, 44 Ga. 595; *Jackson v. Yeomans*, 39 U. C. Q. B. 295.

(z) *Griswold v. Griswold*, 7 Lans. 72; *Owen v. Estes*, 5 Mass. 331.

(a) *Rucker v. Steelman*, 73 Ind. 400.

(b) *Robinson v. Gee*, 1 Ves. Sr. 253; *Whitmore v. Farley*, 28 W. R. 910; *Lang v. Wilkinson*, 57 Ala. 261; *Gafford v. Stearns*, 51 Ala. 443; *Alexander*

Use of
lands; in-
complete
title.

within the statute, and can be enforced though made by parol.(c) But a right to kill and carry away game on another's land is an easement. It differs from a bare use because there is a profit *à prendre*; and a right to enter and occupy land for an indefinite time or for a definite time, if sufficiently long,(d) is within the Statute of Frauds, and such a possessory interest can only be assigned by a writing, although a deed is not necessary.(e) An incomplete legal title can, as a general thing, be assigned by parol. The effect of such transfer is not to vest in the transferee an interest in land, but merely to place in his hands evidence which, upon the payment of a sum of money, or going through certain prescribed forms, will enable him to procure title to real estate.(f) Following in this line we find it ruled that a bidder at a sheriff's sale may assign his bid by parol and the land be conveyed by the sheriff to his assignee, and likewise that the assignment of unlocated land certificates is good by parol.(g) Where an incomplete title under a parol sale is confirmed by the vendor's giving a deed, the courts have held that the deed relates back to the time of the parol sale, and that a judgment recovered against the vendee, after the parol sale but prior to the delivery of the deed, binds the land and cuts out liens which attach after the debtor has become possessed of a complete title.(h)

v. Pardue, 30 Ark. 361; Driver v. Jenkins, 30 id. 122; and see South. Law Rev. Oct. 1882, p. 349.

(c) Wells v. Kingston-upon-Hull, L. R. 10 C. P. 406; Wells v. Deming, 2 Root, 149; McCormick v. Drummatt, 9 Neb. 384; McBee v. Lofts, 1 South. Eq. 92. Such a use of lands, though not an estate in them may nevertheless determine the settlement of a pauper; Scituate v. Hanover, 16 Pick. 224.

(d) Morrison v. Peay, 21 Ark. 112, (8 years).

(e) Webber v. Lee, 9 Q. B. D. 315; Clark v. Gellerson, 20 Me. 18; Miller v. Auburn R. R., 6 Hill, 62; Howard v. Easton, 7 Johns. 205; Lower v. Winters, 7 Cowen, 263; McCoy v. Skinner, Tapp. (Ohio) 69.

(f) It has, however, been ruled in

Kansas that an occupation under the homestead laws of the United States cannot be sold or assigned even by a writing, because such a course can only be pursued by the locator by breaking his oath which he makes upon making entry at the land office; Mellison v. Allen, 30 Kan. 382; Sutphen v. Sutphen, id. 510.

(g) Testerman v. Poe, 2 Dev. & Bat. 105; Reed v. McGrue, 5 Ohio, 385; Cook v. Shute, Cooke (Tenn.), 68; Bledsoe v. Cains, 10 Tex. 460; Cox v. Bray, 28 id. 261; James v. Drake, 39 id. 145; Simpson v. Chapman, 45 id. 566; Jones v. Jones, 49 id. 690; but *contra*, Simms v. Killian, 12 Ired. 253; Lester v. White, 44 Ill. 466; Hayes v. Skidmore, 27 Ohio St. 333.

(h) Lloyd's App., 82 Pa. St. 488.

§ 726. "There needeth neither livery of seisin nor writing to any assignment of dower, because it is due of common right." If the assignment were a conveyance from the ^{Dower, &c.} heir the Statute of Frauds would apply, but the widow holding it by appointment of law, and the assignment being merely an ascertainment of her share by metes and bounds, it may be well made by parol.⁽ⁱ⁾ Still less is the demand for dower within the provisions of the Statute of Frauds, and it may not only be verbal but it can be implied by acts and admissions of the parties.^(j) Dower is itself an interest in land, and can only be sold or transferred as any other interest, and this is equally true before the assignment takes place; in either case a release by the widow must be such as to satisfy the Statute of Frauds.^(k)

Even an inchoate right of dower comes within the protection of the statute, and must be released, if at all, by a writing;^(l) and parol evidence that a gift to a wife was in lieu of dower will not be received.^(m) Dower is, however, protected from parol evidence only because it is an interest in land, and when the right of the widow takes any other form the restrictions of the statute cease to apply. Hence, where the widow's right amounts to a mere money demand, it may be released by parol. Such a case arose in Indiana. The vendee had paid part purchase-money and had possession, but no deed had been delivered; and it was held that the right of his widow to her dower in the amount the land would sell for over the unpaid purchase-money, could be released by parol.⁽ⁿ⁾ A widow's statutory interest in Pennsylvania is, however, considered realty, and can only be released by a writing.^(o)

(i) *Boyers v. Newbank*, 2 Carter, 388; *son v. Jefferson*, 96 Ill. 559; *Moore v. citing Co. Litt.* 35 a, as above quoted, *Tisdale*, 5 B. Mon. 358; *Giles v. Moore*, 4 Gray, 601; *Wright v. DeGroff*, 14 Mich. 164; *Worthington v. Middleton*, 6 Dana, 301; *White v. White*, 1 Har. (N. J.) 214; *Keeler v. Tatnell*, 3 Zab. 62; *Collinson v. Jackson*, 14 Rep. 740. The case of *Warfield v. Castleman*, 5 Mon. 518, held a parol relinquishment good, but there had been a lapse of many years.

(j) *Lenfers v. Henke*, 73 Ill. 411; *Davis v. Tingle*, 8 B. Mon. 541; *Luce v. Stubbs*, 35 Me. 95; *Curtis v. Hobart*, 41 Me. 232; *Lothrop v. Foster*, 51 Me. 367; *Jones v. Brewer*, 1 Pick. 317.

(k) *Smith v. Woodworth*, 4 Dillon, C. C. 588; *Martin v. Wharton*, 38 Ala. 641; *Carnall v. Wilson*, 21 Ark. 68; *Jeffer-*

(l) *Davis v. Davis*, 61 Me. 399.

(m) *Tinney v. Tinney*, 3 Atk. 8.

(n) *Malin v. Coult*, 4 Ind. 536.

(o) *Watterson's App.*, 95 Pa. St. 312.

As analogous to this part of our subject, we may notice the requirements with reference to the release of a husband's right in his wife's real property, and the contingent interest of an heir or devisee. The husband's curtesy is as much protected as the wife's dower, and can only be released or relinquished by a writing.(p) The contingent interest of devisee is also within the statute; but with regard to a son's expectancy in his father's estate the courts are at variance; in Illinois a parol agreement between father and son concerning the expectancy of the latter in the former's estate was sustained, while in Indiana the Statute of Frauds was applied and a like agreement held invalid.(q) The separate estate of a married woman is within the statute, and can only be conveyed by a deed, her husband joining in or assenting to the same. His assent, however, need not be under seal,(r) and the law is the same in regard to her joining in order to bar dower.(s) The statute is applied even more rigorously to protect a married woman's estate than in other cases, and the doctrine of estoppel finds no place as an exception to the statute when her estate is the one in question.(t) A married woman may create orally a general charge on her separate estate for necessities, but not a lien on specific real estate; and in Rhode Island it is provided by statute that a wife's land cannot be made subject to a mechanic's lien without her written assent.(u)

§ 727. The nature of land and the theory of trade are so inconsistent that it was at first held the one could not be the subject of the other.(v) But when the growing import-

(p) *McBride's Est.*, 81 Pa. St. 305, and cases cited under "Dower."

(q) *McDiarmid v. McDiarmid*, 9 Grant, Ch. 157; *Galbraith v. McLain*, 84 Ill. 381; *Stokesberry v. Reynolds*, 57 Ind. 426.

(r) *Baker v. Hathaway*, 5 Allen, 104; *Foreman v. Saxon*, 30 La. Ann. 1118; *Ingoldsby v. Juan*, 12 Cal. 575; *Wing v. Schramm*, 13 Hun, 380.

(s) *Winn v. Ficklen*, 54 Ga. 530.

(t) *Towles v. Fisher*, 77 N. C. 440.

(u) *Maxon v. Scott*, 55 N. Y. 251; *Burke v. Tuitt*, 10 Ir. Ch. 468; *Briggs v. Titus*, 7 R. I. 442. In Iowa the law is that the homestead is exempt from

judicial sale, and it cannot be taken unless a joint instrument is concurred in and signed by both husband and wife. It does not, however, require a conveyance; a written waiver of it at the time of the creation of a debt is sufficient; *Foley v. Cooper*, 43 Iowa, 378; *Clark v. Evarts*, 46 Iowa, 250; *Rutt v. Howell*, 50 Iowa, 536. But in Illinois it has been held that a homestead right may be waived by parol, as where a man mortgaged his property, moved away, and abandoned it; *Vasey v. Board of Trustees*, 59 Ill. 191.

(v) *Ballou v. Spencer*, 4 Cow. 163; *Benners v. Harrison*, 19 Barb. 53.

ance of commerce rendered that doctrine no longer tenable, the necessity arose of so changing the character of one or the theory of the other as to allow of trade in real estate ; and the judges, recognizing the tendency of the times, reduced land in the grasp of commerce to a mere chattel. Partnership dealings in land, therefore, form important exceptions to the Statute of Frauds, and must be considered somewhat at length.

The point has so often arisen in this country that we have developed a law of our own, and do not have to seek our precedents across the Atlantic. A brief glance at the English law will, therefore, suffice. Mr. Lindley, in his work on Partnership,^(w) sums the law in two propositions. "It is held," says that writer, speaking on our present subject, "1, that a partnership constituted without writing is as valid as one constituted by writing ;^(x) and 2, that if a partnership is proved to exist, then it may be shown by parol evidence that its property consists of land."^(y) The second proposition is somewhat shaken by the case of *Caddick v. Skidmore*;^(z) but the same Lord Chancellor (Cranworth) a little later applied the old rule in the case of *Essex v. Essex*.^(a) It would seem, then, that in England this exception to the Statute of Frauds is pretty firmly established.

In this country the weight of decision is in favor of the exception, although in several States the statute is applied to partnership contracts as well as to others. In *Smith vs. Burnham*,^(b) Mr. Justice Story, while sitting in the Circuit Court, refused to enforce a trust arising upon the breach of an oral partnership agreement. But in *Nutt v. Mechanics' Bank*^(c) we find that dower was assigned in equity in real estate bought by partnership and afterwards partitioned among the partners by parol, and Lowell, J., in a still later case,^(d) doubted whether the Statute of Frauds had any reference to contracts of partnership in lands, but he admitted that the question might arise when nothing had been done towards carrying out the contract.

In the case of *In re Warren*^(e) in the United States District Court,

(w) Bk. I., chap. 4.

(x) *Essex v. Essex*, 20 Beav. 449.

(y) *Forster v. Hale*, 5 Ves. 309; *Dale v. Hamilton*, 5 Hare, 369, affirmed 2 Ph. 266.

(z) 2 DeG. & J. 52.

(a) 20 Beav. 449.

(b) 3 Sumn. 437.

(c) 4 Cranch, C. C. 102.

(d) *In re Farmer*, 10 Chic. Leg. News, 395.

(e) *Davies*, 327.

a distinction was made as to the parties interested in the case, and it was held that as to outsiders the partnership could be shown by parol, but between the partners a writing was necessary. In Maine the exception has been recognized, and a partnership contract was proved by verbal testimony, although land had been acquired by the firm ;(*f*) in a later case the subject was quite elaborately discussed, and in the course of the opinion it was remarked as to the effect of the Statute of Frauds in these cases, that it was obviously a matter of no practical importance whether the requirements of the statute were complied with by such a memorandum as it calls for, or whether the case should fall within the recognized exception of trusts arising by implication of law.(*g*) In Massachusetts the exception is practically adopted, although *Dale v. Hamilton* is declared to be an extreme case ;(*h*) but in Indiana *Dale v. Hamilton* is directly followed ;(*i*) and in Connecticut, New Jersey, and New York the exception is given full force.(*j*) The exception seems also to be in force in Illinois, Iowa, North Carolina, Mississippi, Texas, Oregon, and Montana.(*k*)

In Georgia, the exception is enforced only between the partners, or where third parties deal with the firm. And where a stranger to the firm had contracted with reference to its lands, the court held that as to him they were to all intents and purposes real estate.(*l*) The case of *Young v. Pearson*(*m*) held a verbal contract of partnership to deal in lands good, and it was afterwards declared that there was no doubt of this if the contract were partly performed ; but in a still later case it was held that in a conveyance between the partners a written bill of sale was necessary.(*n*)

Of the States on the other side of the question, Pennsylvania undoubtedly takes the lead, the statute being applied even more

(*f*) *Buffum v. Buffum*, 49 Me. 108.

(*g*) *Collins v. Dicker*, 70 Me. 23.

(*h*) *Dyer v. Clark*, 5 Metc. 562 ; *Fall River Whaling Co. v. Borden*, 10 Cush. 471.

(*i*) *Holmes v. McCray*, 51 Ind. 358.

(*j*) *Bunnel v. Taintor*, 4 Conn. 573 ; *Personette v. Pryme*, 34 N. J. Eq. 29 ; *Chester v. Dickerson*, 54 N. Y. 7 ; *Bissell v. Harrington*, 18 Hun, 83 ; *Williams v. Gillies*, 13 Hun, 426, or 18 Alb. L. Jour. 469.

(*k*) *Morrill v. Colehour*, 82 Ill. 625 ; *Miller v. Kendig*, 7 No. West Reporter, 501 ; *Falkner v. Hunt*, 73 N. Car. 573 ; *Evans v. Green*, 23 Miss. 294 ; *Thomas v. Hammond*, 47 Tex. 49 ; *Knott v. Knott*, 6 Oregon, 142 ; *Hirbour v. Reading*, 3 Mont. 18. See also 4 Vict. L. R. Eq. 31.

(*l*) *Black v. Black*, 15 Ga. 449.

(*m*) 1 Cal. 449.

(*n*) *Pio Pico v. Cuyas*, 47 Cal. 174 ; *Plath v. Kitzmuller*, 52 Cal. 492.

strictly to partnership contracts than to others.(o) The statute is also given full force in Alabama, Kentucky, Louisiana, Maryland, and Virginia, though in the first-mentioned State it has been held that after verdict the Supreme Court will presume the partnership contract to be in writing.(p) There are a few cases which do not come within the provisions of the statute which appear to be exceptions to it; as where one party furnishes money with which to buy land, and the other party is to sell it at an advance and share in the profits. In such cases the latter never has any interest in the land, and many courts hold parol arrangements of this kind good as relating to money only and not to land.(q)

§ 728. In England both the courts and Parliament have been singularly inconsistent with reference to the character of shares of stock.(r) The tendency in earlier times ^{Shares of stock.} seems to have been towards regarding them as realty;(s) but this view is now almost entirely abandoned, and the later cases have done much to establish the rule that shares of stock are personalty.(t) The decisions may have been somewhat influenced by

(o) *Sedam v. Shaffer*, 5 W. & S. 529; *Ridgway's App.*, 15 Pa. St. 180; *Lancaster Bank v. Myley*, 13 Pa. St. 544; *Le Fevre's App.*, 69 Pa. St. 125; *McCormick's App.*, 57 Pa. St. 58.

(p) *Henley v. Brown*, 1 Stewart (Ala.), 144; *Rowland v. Boozer*, 10 Ala. 695; *Parker v. Bodley*, 4 Bibb, 103; *Dunbar v. Bullard*, 2 La. Ann. 822; *Kidd v. Carson*, 33 Md. 43; *Henderson v. Hudson*, 1 Munf. 510; *Wheatley v. Calhoun*, 12 Leigh, 272; and in Canada the statute seems to be enforced; *Burn v. Strong*, 14 Gr. 657.

(q) *Miller v. Kendig*, 55 Ia. 174; *Porter v. Ewing*, 24 Ill. 618; *Battle v. Jenkins*, 25 La. Ann. 594. See chapter on "Trusts."

(r) See chapter on "Chattels."

(s) New River shares were declared by Parliament to be realty, and so considered by the courts; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Townsend v. Ash*, 3 Atk. 336; *Davall v. New River Co.*, 3 DeG. & S. 394. In *Ware v.*

Cumberlege, 20 Beav. 505, shares in a water company were held realty within Mortmain Act, but this case was overruled by *Edwards v. Hall*, 6 DeG. M. & G. 90. It was also held that shares of a canal company made under authority of 33 Geo. III., 34 Geo. III., and 37 Geo. III. were within the Statute of Mortmain; *Tomlinson v. Tomlinson*, 9 Beav. 460; and the same conclusion was reached in *Buckeridge v. Ingram*, 2 Ves. Jr. 652, with regard to navigation stock; but Lord Kenyon in *Latham v. Barber*, 6 T. R. 67, seemed to consider such shares personalty. In *Boyce v. Green*, Batty, 616, the court held that the transfer of shares in the mining companies of Ireland was within the Statute of Frauds, but the contrary has been held in many cases.

(t) Shares in water works held personalty, *Weekley v. Weekley*, 2 Y. & C. 281; *Bligh v. Brent*, 2 Y. & C. Ex. 294; dock and canal shares, *Walker v. Milne*, 11 Beav. 507; *Robinson v. Addison*, 2 Beav. 520; gaslight shares, *Sparling*

the circumstances under which the point arose for determination. In cases where the Statutes of Mortmain were before the court, the decisions seemed to run more to the realty side than in other cases,^(u) while in cases where the question is whether the owners of shares are entitled to the elective franchise or not, the answer has invariably been no.^(v)

The real test would seem to be whether, under ordinary circumstances, the share will result to the holder in the shape of land or of personalty. It is upon this ground that the rule has become at last so nearly settled, for though land may be a part of the joint stock capital, yet the real substantial interest of the shareholder, and that which the share represents, is the right to participate in the profits.^(w) In this country the law is more firmly established in most of the States, there being no question about shares being personalty. In Connecticut and Kentucky the contrary was formerly held, but in each State the law has been changed by statute. In New York there are cases on both sides of the question, but in the other States the decisions are all in favor of personalty.^(x)

v. Parker, 9 Beav. 450; *Robinson v. Ainge*, L. R. 4 C. P. 432; *Thompson v. Thompson*, 1 Coll. C. C. 386; foreign mining company shares, *Re Richardson*, M. & C. 50; stock of companies carried on on the cost-book principle, *Watson v. Spratley*, 10 Exch. 232; *Powell v. Jessopp*, 18 C. B. 354; *Walker v. Bartlett*, 18 C. B. 845; S. C. 17 C. B. 446; *Hayter v. Tucker*, 4 Kay & J. 245; railroad shares, *Duncuft v. Albrecht*, 12 Sim. 198; *Ashton v. Ld. Langdale*, 4 DeG. & Sm. 402; *Linley v. Taylor*, 1 Giff. 67, and 2 DeG. F. & J. 84; *Bradley v. Holdsworth*, 3 M. & W. 424. Certain statutes have been passed in England declaring that the stock of companies formed under them shall be personalty, 8 & 9 Vict. c. 16, § 7; 25 & 26 Vict. c. 89, § 22; *Holdsworth v. Davenport*, 3 Ch. Div. 190; *Broughton v. Hutt*, 3 DeG. & J. 504.

^(u) *Morris v. Glynn*, 27 Beav. 218; *Tomlinson v. Tomlinson*, 9 Beav. 460; *Ware v. Cumberlege*, 20 Beav. 503; but

even this tendency is now checked, and these cases overruled or shaken.

^(v) *Bulmer v. Norris*, 9 C. B. N. S. 29; *Ackland v. Lewis*, 9 C. B. N. S. 44; *Bennett v. Blain*, 15 C. B. N. S. 517; *Freeman v. Gainsford*, 18 C. B. N. S. 185.

^(w) *Entwistle v. Davis*, L. R. 4 Eq. 275; *Watson v. Spratley*, 10 Exch. 236; and *Toppin v. Lomas*, 16 C. B. 145, in which there was no personal liability, and all the bondholders were entitled to the benefit of mortgages taken by the company. The bonds were held realty.

^(x) *Tappan v. Merchants' Nat. Bank*, 19 Wall. 499; *Welies v. Cowles*, 2 Conn. 574; *Southwestern R. W. v. Thomason*, 40 Ga. 408; *Price v. Price*, 6 Dana, 107; *Copeland v. Copeland*, 7 Bush, 352; *Tip-pets v. Walker*, 4 Mass. 595; *Denton v. Livingstone*, 9 Johns. 100; *Brownson v. Chapman*, 63 N. Y. 625; *Johns v. Johns*, 1 Ohio St. 351; *Arnold v. Ruggles*, 1 R. I. 165; *Wheelock v. Moulton*, 15 Vt. 519; *Barksdale v. Finney*, 14 Gratt. 356.

§ 729. The feudal principle of tenures was carried out in the granting of estates by livery of seisin. The principle gradually died out, but the form was preserved as a fitting ceremony in the transfer of so substantial a thing as land. When the art of writing became common, the deed of feoffment was introduced in order to ascertain with more precision the nature and extent of the estate granted. This deed, however, was of no validity, unless accompanied by the old ceremony of livery of seisin.^(y)

THIRD,
what con-
tracts con-
cerning land
are within
the statute?

§ 730. By the common law estates less than freehold might be created or assigned either by deed, by writing without seal, or by word of mouth merely. The Statute of Frauds provided that the creation and assignment of all estates should be evidenced by a writing signed by the party to be charged. This statute did not destroy the distinction existing previously between freehold estates and those less than freehold; it simply provided for a writing in all cases, and in other respects it did not affect the requisites of a conveyance.^(z) After following this line of argument, Mr. Justice Platt said in *Jackson v. Wood*:^(a) "I construe this statute as though the form of expression had been thus: 'No estate of freehold shall be granted unless it be by deed *signed* by the party granting; and no estate less than a freehold (excepting leases for three years, &c.) shall be granted or surrendered, unless by deed or note in writing *signed* by the grantor.'" This construction is generally received as the true one in courts of law, but it is held that a conveyance of a freehold interest, which only wants a seal to make it entirely regular, will at all events pass a good equitable title to the estate in question.^(b)

Seal, before
and after
Statute of
Frauds.

(y) *Cooke v. Trewman, Tothill* (Holb. ed.) 69.

(z) *Richardson v. Bates*, 8 Oh. St. 262.

(a) 12 Johns. 76.

(b) *Beck d. Fry v. Phillips*, 5 Burr. 2827; *Beely v. Parry*, 3 Lev. 155; *Bryan v. Hyre*, 1 Robinson (Va.), 94; *Joy v. Boston Bank*, 115 Mass. 60; *McCabe v. Hunter*, 7 Mo. 356; *Moss v. Anderson*, 7 id. 339; *Holliday v. Marshall*, 7 Johns. 211; *Headley v. Goundry*, 41 Barb. 279; *Platt v. Eggleston*, 20 Ohio St. 419; *Woods v. Wallace*, 22 Pa. St. 176;

Campbell v. Thomas, 42 Wis. 441. It was, however, said in *Wheeler v. Newton*, Prec. Ch. (Finch) 16, that unsealed writings have a better position since the Statute of Frauds. As to unsealed writing passing equitable interests, see *Evans v. Evans*, 29 Pa. St. 280; *Simpson v. Breckenridge*, 32 Pa. St. 290. In many of the States there has been legislation upon the subject, either requiring a seal or raising unsealed writings to the rank of specialties. In Kentucky, Iowa, Louisiana, Texas, and others, a

§ 731. The general provisions of the Statute of Frauds now regulate all contracts for the sale of lands wherever the common law governs.(c) In some States those sections of the statute which we are considering have been copied *verbatim*; in others the wording has been slightly changed without altering the meaning.(c') In Pennsylvania, part of the fourth section is not upon the statute books, which has given rise to some peculiarities in the law of that State, which will be noticed at the end of this chapter.(d)

Extent of the provisions of the statute.

§ 732. As a rule, *contracts relating to the sale of land are within the Statute of Frauds, and must be in writing.* General effect of the statute upon They not only fail to pass title to the land, but no

seal is no longer necessary, while New York and Indiana are among the States whose legislatures have expressly declared signing and sealing to be necessary. *Kibby v. Chetwood*, 4 T. B. Mon. 92; *Pierson v. Armstrong*, 1 Ia. 293; *Switzer v. Knapps*, 10 Ia. 74; *Smith v. Kinney*, 30 La. Ann. 334; *Martin v. Weyman*, 26 Tex. 466; *Morse v. Salisbury*, 48 N. Y. 643; *Parks v. Hazlerigg*, 7 Blackf. (Ind.) 536.

(c) *Read v. Brookman*, 3 T. R. 156; *Castaneda v. Toll*, 6 Martin, 558; *Ford v. Garner*, 49 Ala. 604; *Morgan v. Locke*, 28 La. Ann. 808; *Morgan v. Tillett*, 2 Jones, Eq. 40.

(c') See Appendix for the various acts *verbatim*.

(d) There are a few cases in which a writing is required, besides the ordinary memorandum of the Statute of Frauds, and other cases in which the Statute of Frauds is dispensed with. These cases rest upon special acts passed in the different States, some of which are mere fiscal measures, and others passed for the further protection of title to land. It is also possible for the legislature, without any writing, by a mere resolve to part with the rights of the State in any land, and vest them in grantees; *Mayo v. Libby*, 12 Mass. 244. A New York statute authorizes taking of land

for public improvements under owner's written assent; held that this does not apply to an infant's estate, so that his guardian could give the consent required; *Battell v. Burrill*, 50 N. Y. 16. An Iowa statute requires the clerk under certain circumstances to write "sold" opposite description of land in tax-books, but it has been held that a non-compliance with this act does not invalidate a tax sale otherwise regular; *Playter v. Cochran*, 37 Ia. 260. It was held in Louisiana that an old act requiring all sales of land to be made before a notary, was a fiscal measure to enable the collection of a tax, and that as Louisiana was exempt from this tax, the law did not prevail there; nor had a royal Spanish governor the power to introduce it; *Gonzales v. Sanchez*, 4 Martin, N. S. 659. In the same general line see *Devenish v. Baines*, Prec. Ch. 3; *Chibborne's Case*, Dyer, 229 a; *Et parte Hawkins*, 13 Simons, 579; *Harborough v. Shardlow*, 7 M. & W. 92; *Frisbie v. Whitney*, 9 Wall. 193; *Cofield v. McClelland*, 16 id. 335; *Pence v. Sandford*, 28 Ark. 238; *Bonds v. Hickman*, 29 Cal. 465; *Davis v. Teays*, 3 Gratt. 238; *Gough v. Dorsey*, 27 Wis. 127. Title by descent or escheat is of course without the provisions of the Statute of Frauds.

action can be successful either to enforce them, or to obtain damages for their breach.^(e)

contracts touching land.

§ 733. Courts of equity have indeed established some exceptions,

(e) *Williams v. Cowart*, 27 Ga. 193; *Gaddis v. Leeson*, 55 Ill. 84; *Curnutt v. Roberts*, 11 B. Mon. 43; *Stephens v. Reavis*, 3 Ky. L. Rep. 475; *Michel v. Dolliole*, 1 La. Ann. 460; *Dowling v. McKenney*, 124 Mass. 480; *Brown v. Eaton*, 21 Minn. 410; *Chapman v. Templeton*, 53 Mo. 464; *Merrill v. Downs*, 41 N. H. 72; *Ryan v. Wilson*, 56 Tex. 36; *Ballard v. Bond*, 32 Vt. 358; *William & Mary College v. Powell*, 12 Gratt. 390.

Spanish law prevailed in all the country west of the Mississippi ceded by France to the United States by the treaty of 1803. "By the civil law, which was the foundation of the Spanish system of laws, no verbal solemnities were required to give validity to a contract. All that was required was the apprehension and consent of each party expressed in any form of words; Justin. lib. 3, title 26." *Mitchell v. Tucker*, 10 Mo. 262; and see *Spence Eq. Jur.*, *33. A hurried glance at the cases would lead one to think that verbal sales of land were valid under the Spanish law as it existed in the south-western section of this country. But a more careful consideration shows that this statement must be qualified. In *Hoen v. Simmons*, 1 Cal. 121, it is said that parol sales of lands were invalid under Mexican and Spanish laws, except perhaps where such possession was taken as was analogous to English livery of seisin. In Mexico it seems that laws were passed requiring sales of land to be in writing; they were, however, primarily fiscal measures, and the forms prescribed were not strictly followed, and afterwards fell somewhat into disuse; *Hayes v. Bona*, 7 Cal. 158; *Stafford v. Lick*, 10 Cal. 16. It would seem from the last case cited that either these laws, or the custom of California,

demanding written sales, and it was there said that the writing should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid. However this may have been, it is certain that even in California verbal contracts were binding when fully executed, and the courts would enforce them specifically, on the ground of part performance, in cases where the acts done would not have been sufficient to form an exception to the English statute; *Cook v. Frink*, 44 Cal. 331; *Hall v. Soule*, 45 Cal. 587; *Tohler v. Folson*, 1 Cal. 210. Outside of California, verbal sales were given more validity, and some cases go so far as to declare them good without any qualification; *Maes v. Gillard*, 7 Martin, N. S. 321; *Lockett v. Tobey*, 10 La. Ann. 715; *Allen v. Moss*, 27 Mo. 360; *Langlois v. Crawford*, 59 Mo. 466. The great majority of cases, however, establish the rule that there must be some acquiescence in the sale in order to give it validity, and on this ground the courts have sustained or enforced verbal sales, partitions, exchanges, and grants from the Government, when followed by possession; *Sanchez v. Gonzalez*, 11 Martin, 211; *LeBlanc v. Victor*, 3 La. 47; *Sacket v. Hooper*, 3 La. 107; *D'Orgenoy v. Droz*, 13 La. 397; *Devall v. Choppin*, 15 La. 574; *Landry v. Martin*, 15 La. 9; *Riddle v. Ratliff*, 8 La. Ann. 108; *Choppin v. Michel*, 11 Robinson, 237; *Briscoe v. Bronaugh*, 1 Tex. 330; *Herndon v. Casiano*, 7 Tex. 335; *Monroe v. Searcy*, 20 Tex. 351; *Paschal v. Acklin*, 27 Tex. 191; *Scott v. Maynard*, *Dallam's Dig.* 551; *Winn v. Cole*, *Walker (Miss.)*, 123. In *Sullivan v. Dimmitt*, 34 Tex. 123, the law is concisely stated to be, that delivery of possession is necessary, if

Equitable
exceptions.

thinking it better to do this than to make a statute passed to suppress fraud the means of shielding it. To this cause is due the doctrine of part performance, which has become as well established in courts both of law and equity as the statute itself, and the consideration of it forms several chapters of this work. The doctrine of estoppel has also been applied at times by courts of equity, and this subject will be touched on later.(e') But courts of law, barring the exception of part performance, have in all cases given full force to the statute. No allowance has been made where the transaction has been between those in confidential relation with each other, and its provisions have been upheld in such cases, as well as where the dealings were between strangers. This is illustrated by a Tennessee case,(f) in which the contract was between husband and wife after she had conveyed her land to him absolutely, that he should so arrange that after his death her brother and sister should have the property. The contract was held invalid, and it was said: "This court has come to the determination some years since to execute the Statute of Frauds as nearly within the letter as may be."

§ 734. The provisions of the statute cannot be escaped by attempting to transfer title without a direct contract of sale. Where an agreement was made with a tenant entering under a written lease for one year that he should hold till the affairs of lessor should be settled, the statute was applied to prevent what otherwise might amount to a verbal transfer of title.(g) The strictness of the law is well exemplified by the recent case of Birmingham Canal Co. v. Cartwright.(h) In this case the vendor of land covenanted that if he proposed to sell land adjacent to that just sold he would first give an offer and refusal to the present vendee. It was held that the offer must be

Other exceptions; Statute of Limitations, &c.
vendor has held possession; but if not, as in the case of wild lands, authority to take possession is all that need be given. The common law now prevails in these States, and the provisions of the Statute of Frauds regulate contracts which have to do with land; it follows, therefore, that one relying on a verbal sale of land must show that it was made when such sales

were valid; *Badon v. Bahan*, 4 La. Ann. 470.

(e') *Post*, § 744.

(f) *Campbell v. Taul*, 3 Yerg. 558; see also *Hickman v. Groves*, 1 A. K. Marsh. 87.

(g) *Wheeler v. Cowan*, 25 Me. 285; and see *Vick v. Ayres*, 56 Miss. 671; *Jacobs v. Miller*, 15 N. W. Rep. 44.

(h) 11 Ch. Div. 434.

in writing, *i. e.*, an offer that could be enforced; hence the vendees, not having accepted within the specified time an oral offer, did not lose their right.

The most common way of attempting to escape the statute and transfer title without a writing, is by the introduction of parol evidence. A good instance of this is had where it is attempted to show an agreement between the vendee of land and a third person that the latter should be admitted to share in the purchase, or where one signing as surety offers evidence of a parol agreement that he was to be directly interested in the purchase. In all such cases the Statute of Frauds is brought to bear and the evidence excluded.⁽ⁱ⁾ It is an even less plausible case when it is attempted to prove title to land directly by parol evidence, whether by the admissions and declarations of the parties or by general reputation as being entered in a county atlas as owner of a certain tract.^(j) Title to land may be acquired either directly from the Government, or may pass from one person to another under the Statute of Limitations, without any deed or writing whatsoever. In the case of acquiring unseated lands, and especially mining claims, it may be properly said that the Government is divested of no title, but a mere right of entry given under it. The title thus acquired is a conditional one which can, however, be perfected by obtaining a patent.^(k)

But to pass to the effect of the Statute of Limitations. By it title to land can be proved by parol, the parol evidence being admissible to show both the character and length of the possession.^(l) When once the statute has taken effect the estate is as valid as if created by deed, and in all respects the same.^(m) But although it cannot be divested by parol sale or declarations made after that time, yet evidence can be given to rebut title arising from

(i) *Rowland v. Crawford*, 7 H. & J. 53; the owner that he got the land by an entailment are admissible as evidence of pedigree; *Maslin v. Thomas*, 8 Gill, 30.

Herring, 21 Gratt. 680. There is a dictum to the contrary in *Brown v. Brown*, 7 Va. L. Jour. 687.

(j) *Compton v. Cassada*, 32 Ga. 434; *Mix v. The People*, 92 Ill. 554; *Mumford v. Miller*, 7 Bradw. 64; *Davis v. Prevost*, 7 La. 274; *Doe v. Todd*, 2 Allen (N. B.), 264. But declarations of

(k) *Gore v. McBrayer*, 18 Cal. 589.

(l) *Stretch v. Schenck*, 23 Ind. 77; *Bondreau v. Bondreau*, 12 Martin, 667; *Machea v. Avegno*, 25 La. Ann. 56; *Jewett v. Hussey*, 70 Me. 435; *Pitts v. Wilder*, 1 Comstock, 525.

(m) *Sears v. Taylor*, 4 Col. 39; *Buel v. Frazier*, 38 Cal. 697.

adverse possession, by showing the possession not to have been adverse or that it did not continue for the statutory period.(n) The interest of the possessor only becomes land when the Statute of Limitations is satisfied, and prior to that time he may dispose of whatever interest is his by parol sale.(o) And the rule is the same where one has made improvements on public land, and only as to the United States is a trespasser.(p) But in the latter case it has been held that the interest thus acquired is sufficiently property to be subject to taxation.(q)

There is another class of cases in which parol evidence is allowed to affect title to land, but it is in an explanatory or supplementary way, the declarations being made at the time of a written contract, and really forming part of the transaction though not included in the memorandum: An announcement by the sheriff that a smaller tract had been taken out of the part about to be sold has been received in evidence, and where there was an agreement between vendor and vendee that the latter could rescind the contract within a year if he saw fit, and further that there should be no personal liability on the bond and mortgage given by him for the purchase-money (this was not inserted in the bond because the vendor said it was unnecessary), it was held that this was not a separate parol contract void by the Statute of Frauds, and only to be admitted by showing fraud.(r) Such evidence must not, however, contradict the deed or memorandum.(s)

§ 735. If part of an entire contract is within the statute the whole is governed by it. The courts will not sever the contract in order to give force to the part without the statute;(t) and it has also been held that voluntary performance of that part of the contract which is void is no ground for compelling performance of the remainder.(u)

(n) *Whiting v. Taylor*, 8 Dana, 428; *Robinson v. Phillips*, 56 N. Y. 634; *Kitt-ridge v. Landry*, 2 Robinson, 77; but see *Doe v. Hasson*, 3 Allen (N. B.), 453.

(o) *Danforth v. Lowry*, 3 Hayw. 69; *Hatfield v. Wallace*, 7 Mo. 114; *Miller v. Miller*, 60 Pa. St. 22; *Stewart v. Chadwick*, 8 Ia. 463.

(p) *Clark v. Shulz*, 4 Mo. 235.

(q) *People v. Shearer*, 30 Cal. 645.

(r) *Ogilvie v. Foljambe*, 3 Meriv. 53; *Swartwout v. Cole*, 4 Cow. 593; *Bartlett v. Judd*, 21 N. Y. 203; *Brown v. Bank of Chambersburg*, 3 Pa. St. 187; *Greenawalt v. Kohne*, 85 id. 369.

(s) *Churchill v. Rogers*, 3 Mon. 81.

(t) *Crawford v. Morrell*, 8 Johns. 256; *Day v. N. Y. & C. R. R.*, 31 Barb. 552; *Duncan v. Blair*, 5 Denio, 195.

(u) *Dow v. Way*, 64 Barb. 257. In

§ 736. The construction put upon the Statute of Frauds is such as to make a parol sale of lands not absolutely void but merely voidable, and one entering under such a contract becomes a tenant at will and cannot dispute his grantor's title.(v) The statute, moreover, may be waived by the vendor, in which case the sale is good without a writing;(w) or if the vendee under the parol contract takes possession under it, he cannot be treated as a trespasser until the contract has first been disaffirmed by the vendor.(x) The contract may be rescinded or disaffirmed by either party, but prior to that time the vendor cannot take proceedings to recover the possession. Before disaffirmance the vendee is only liable for use and occupation as a tenant, but after the contract has been rescinded an action for unlawful detainer will lie; but vendee cannot be evicted until compensated for improvements.(y) Disaffirmance by the vendor need not be express notification that the contract is rescinded; it is implied by a subsequent valid sale or by the death of the vendor, and in the latter case the sale cannot be confirmed or validated by his representatives.(z)

§ 737. A parol contract of sale which is entirely executory cannot be enforced by either party; the vendee cannot demand a conveyance, for the contract was invalid; and the vendor cannot recover the price of the land, because the promise to pay that price was without consideration;(a) nor has such a contract enough validity to sup-

Partly-performed oral contracts for the sale of land.

some cases it is held that the contract is severable, and that action may be maintained on the part without the statute; *Green v. Saddington*, 7 E. & B. 507; *Detroit R. R. v. Forbes*, 30 Mich. 173. See generally on this point the chapter on "Severability."

(v) *Hamilton v. Gilbert*, 2 Heisk. 681; *Whitney v. Cochran*, 1 Scam. 210; *Beard v. Converse*, 84 Ill. 512; *Bailey v. Ward*, 32 La. Ann. 840; *Armstrong v. Armstrong*, 21 U. C. C. P. 8; and *contra James v. Patterson*, 1 Swan, 311. See chapters on "Validity" and "Voluntary Performance."

(w) *Potter v. Potter*, 1 Ves. Sr. 441; *Gagnor v. Flechteau*, 15 Low. Can. R. 89.

(x) *Broker v. Scobey*, 56 Ind. 593; *Baker v. Hale*, 6 Baxt. 49; *Beattie v. Connolly*, 39 N. J. Law, 161; but a parol contract for a future conveyance of land does not justify the vendee in going upon the land; *Witcher v. Morey*, 39 Vt. 459.

(y) *Whitney v. Cochran*, 1 Scam. 210; *Smith v. Moberly*, 15 B. Mon. 72; *Sullivan v. Ivey*, 2 Sneed, 487; *Daniel v. Crumpler*, 75 N. Car. 186.

(z) *Hughes v. Hatchett*, 55 Ala. 544; *Planters' Bank v. Vandyck*, 4 Heisk. 620; *Bates v. Sargent*, 51 Me. 424.

(a) *Duncan v. Clements*, 17 Ark. 280; *Bumford v. Purcell*, 4 G. Green (Ia.), 489; *Owings v. Mason*, 2 A. K. Marsh.

port an action for damages by either party.(b) But where there has been performance either in whole or in part by one party, the courts in many instances have allowed that party to recover compensation for his expenses as well as the consideration paid under the contract. Let us first examine the cases in which the vendee has partly performed his side of the agreement. No performance by the vendee alone can so affect the contract as to give rise to a decree for specific performance. The courts are not disposed to extend the exceptions to the statute, thereby destroying its benefit; and mere payment of the purchase-money or performance of some other consideration does not constitute sufficient part performance to take the case out of the statute.(c)

A few cases are found where the particular facts have so influenced the court that this rule has been relaxed, but they cannot be considered as shaking a rule so universally recognized as binding. *Dodge v. Wellman* furnishes us with an example of this kind. It is there stated generally that where one has taken title as security for the balance of price paid by him, and under a promise to convey to the original vendee on repayment of this loan, a court of equity will enforce performance of the parol promise, on the principle that a party will not be permitted to insist on the Statute of Frauds to protect him in the enjoyment of advantages procured under it. It must not be made a shield to cover fraud. But the facts of the case do not warrant such a broad statement. The defendant was in possession, and the lender was to execute a memorandum of the agreement to reconvey. The defendant continued in possession, and ejectment was brought by the lender. It appeared that interest was to be paid on this loan, which gave rise to the inference that defendant was to have possession and profits. His

380; *Craig v. Prattler*, 2 B. Mon. 9; *Pennsylvania rule as set forth at length*
Boyd v. Stone, 11 Mass. 342; *Crawford* at the close of this chapter.

v. Parsons, 18 N. H. 294; *Campbell v.* (c) *Edmonstone v. Edmonstone*, 33
Campbell, 2 Jones, Eq. 365; *Bonham v.* Scott. Jur. 514; *Abell v. Calderwood*, 4
Craig, 80 N. Car. 228. Cal. 90; *Gallager v. Mars*, 50 id. 25;

(b) *Ballard v. Bond*, 32 Vt. 355; *Preston v. Casner*, 104 Ill. 262; *Sher-*
Bartlett v. Aitken, 48 Cal. 405; *Mc-*burne *v. Fuller*, 5 Mass. 133; *Curtis v.*
Cracken v. McCracken, 88 N. Car. 273; *Abbe*, 39 Mich. 442; *Folsom v. Great*
Voy v. Weir, 9 U. C. C. P. 487; *Anderson v. Smith*, 4 La. Ann. 526; *Bauduc*
v. Conrey, 10 Robins. 471. But see the *1 Watts*, 392. See chapters on "Part
Performance."

equitable title was good notwithstanding the Statute of Frauds.(d) Where the consideration is work or service of any kind, which has been performed in pursuance of the contract, the plaintiff has a stronger case. In a recent case in Iowa(e) this state of facts was before the court and specific performance was decreed, but the case is not well considered, and there is no citation of authority. In Illinois a like decision was reached very recently. The promisee in this case had worked for her father under the promise for thirty-eight years. To aid in the decision thus reached was the fact that for many years during the old age of her father the promisee had acted as owner of the land, and this the court called possession.(f) A similar case has just been decided by the House of Lords.(g) In the Exchequer the plaintiff was given the relief asked for, but the Court of Appeals reversed the decree, and their ruling was sustained by the House of Lords. This case, which was a strong one for the claimant, we may consider as settling the law on this point.(h)

§ 738. The equity attempted to be enforced by such decisions, and which is really the foundation of all exceptions to the statute, is worked out equally well by allowing the vendee to recover the money he has paid out under the contract, or, in case the consideration was work done or services rendered, the value of that work or service. Such a ruling does not give any validity to the contract, but the recovery is made on an implied promise to return the money or pay for the services. This recovery must be carefully distinguished from an action for damages, which is not allowed outside of Pennsylvania, barring one or two contrary cases, which will be noticed hereafter. Where the vendee has partly performed, he cannot recover the consideration already paid until the vendor repudiates the contract, and where an agreement is to the effect that when the work is done the other party shall convey the land, the courts have held that before an action can be brought for the value of the services, the defendant must be notified of their completion, and be given a reasonable time in which to perform his part of the agreement.(i)

(d) *Dodge v. Wellman*, 1 Abb. App. 512.

(e) *Rink v. Sample*, 56 Ia. 100.

(f) *Warren v. Warren*, 105 Ill. 568.

(g) *Maddison v. Alderson*, 8 App. Cases, 467.

(h) See *DeMoss v. Robinson*, 46 Mich. 63.

(i) *Cope v. Williams*, 4 Ala. 364;

Johnson v. Moore, 1 Blackf. (Ind.) 253;

Lingle v. Clemens, 17 Ind. 124; *Richards v. Allen*, 17 Me. 296.

It is well settled that where the plaintiff, vendee in the parol agreement, attempts merely to recover the consideration paid by him in pursuance of the parol contract, he will succeed.(j) If the part performance by the vendee consists of money paid, the case is a plain one—the money is to be returned with interest. But where the plaintiff has performed work, the value of which is of course uncertain, there has been a constant strain brought to bear upon the courts to adopt the value which the parties themselves have given to the work; namely, the value of the land. This opinion was once quite widely received, and a majority of the early cases lay down as law that the value of the land determines the value of the work.

It gradually dawned upon the judges that there was no real difference between the land itself and its market value; and that allowing the plaintiff to recover the latter was, in effect, giving him specific performance of the contract. The position was, therefore, abandoned by most of the courts, and Indiana and Iowa stand alone in support of the old doctrine. In Connecticut there is a case analogous to these, which might be followed as a precedent should this point ever come directly before the court; in which case this State must also be classed with the two just mentioned. That case(k) was an action for damages on a *quantum meruit* for work done under a contract void by the year clause of this same statute; the court let in evidence of the void contract to help in ascertaining the damages. In New Hampshire a middle course is adopted, and one which seems consonant with reason and common sense. It was there held that a jury might take into consideration the value of the land in estimating the value of the work, although this was not the only or an imperative standard. A case which arose but a few years later in the same court seems from the whole opinion to deny even that weight to the value of the land as evidence, but in the closing sentence of the opinion the learned justice strongly asserts that the conclusions to which the court has come are the only ones that can be reached without overruling *Ham v. Goodrich*. We therefore venture no opinion of our own as to the present state of the law in New Hampshire.(l)

(j) *Quackenbush v. Ehle*, 5 Barb. 469; *Crawford v. Parsons*, 18 N. H. 294; *Sutton v. Rowley*, 44 Mich. 113. All the cases cited under the head of damages go to sustain this point.

(k) *Clark v. Terry*, 25 Conn. 399.

(l) See *Burlingame v. Burlingame*,

§ 739. Let us next inquire whether an action of *damages* will lie by the vendee either in place of or in addition to the recovery of the actual purchase-money paid. In Pennsylvania this is allowed, the damages being mere reimbursement for expenses and loss of time and not including loss of the bargain except in case of fraud. The case of *Welch v. Lawson*(*m*) is the only one outside of Pennsylvania which sanctions this rule. The facts in that case favored the plaintiff, he being put to the inconvenience of moving several miles, and then being turned out at a time when tenements were scarce. The court seemed to be influenced in their decision by the law in Pennsylvania and by the fact that in other States compensation for improvements was allowed.(*n*) In *Lee v. Howe*(*o*) there is a somewhat similar decision. The court in that case entertained a bill for compensation because the part performance was such as to justify specific execution of the contract; but this was impossible, as the defendant had parted with his title. The damages given in this case included loss of bargain.(*p*)

Recovery of damages by vendee.

§ 740. When the *vendor* is plaintiff in an action to enforce the contract the case is a stronger one, and many of our courts hold that as the vendor is ready to be bound the statute has no effect. In a Vermont case(*q*) a distinction is drawn by the court between cases in which a

Enforcement of the contract by vendor.

7 Cow. 92; *King v. Brown*, 2 Hill, 485; exclude evidence of the contract altogether.

Nones v. Homer, 2 Hilt. 116; as supporting the old view in New York. But see *Erben v. Lorillard*, 19 N. Y. 299. For a full discussion of the development of Pennsylvania law on the subject of damages, see the closing sections of this chapter. *Frost v. Tarr*, 53 Ind. 390, and cases cited; *Bonner v. Urton*, 3 G. Green (Iowa), 228; *Hopkins v. Lee*, 6 Wheat. 109; support the old doctrine. *Clark v. Terry*, 25 Conn. 399; *Ham v. Goodrich*, 37 N. H. 190; *Emery v. Smith*, 46 id. 151, 155-6; are cases on the border line. *Watson v. Watson*, 1 Houst. (Del.) 211; *Sutton v. Rowley*, 44 Mich. 113, and cases cited; *Baxter v. Kitch*, 37 Ind. 554; *Crawford v. Parsons*, 18 N. H. 294; *Fuller v. Reed*, 38 Cal. 99; *Erben v. Lorillard*, *supra*;

(*m*) 32 Miss. 170.

(*n*) See the arguments of counsel in this case (*Welch v. Lawson*, 32 Miss. 170), for a discussion of this subject. See also *Richards v. Allen*, 17 Me. 296; *Reynolds v. Johnston*, 13 Tex. 214; *Hemphill v. Miller*, 16 Ark. 287; *Spiller v. Cass*, 58 N. H. 490; *McCracken v. McCracken*, 88 N. Car. 273, as allowing recovery for improvements.

(*o*) 27 Mo. 521.

(*p*) But loss of the bargain is not generally allowed even where the contract was valid, as in the case just cited, unless there was fraud; *Bain v. Fothergill*, L. R. 7 H. L. C. 158.

(*q*) *King v. Smith*, 33 Vt. 25.

deed has been accepted and those in which the tender has been refused, specific performance being decreed in the one case and denied in the other. On this ground only can the Pennsylvania cases be reconciled, but the better view may be that the later cases have overruled *Tripp v. Bishop*.^(r)

In most of the States, however, the law is settled definitely one way or the other, either by the wording of the section or by judicial decision, and this distinction has no weight. In New York, Massachusetts, Indiana, South Carolina, Wisconsin, Iowa, Kentucky, Tennessee, and Arkansas, the vendor can recover the purchase-money either as such or by way of damages. But in Alabama, Maine, North Carolina, Missouri, and Louisiana the contrary is just as firmly established. In North Carolina it was said that to bind either party, he must sign, for there is just as much danger of fraud being perpetrated upon the vendee by making him pay a fabulous price for land which he has never bargained for, as upon the vendor by depriving him of his land at any price. It may be added that a Kentucky case holds practically this same view.^(s)

In Pennsylvania there has not been entire uniformity of decision, but the later cases seem to put this State in line with those last cited, and set up want of mutuality as a defence to an action by the vendor. But the doctrine of *mutuality* does not arise in this connection, since the plaintiff has signified his willingness to be bound by bringing suit, and it is hard to see how the question can ever arise under the Pennsylvania statute, as it contains no provision requiring the vendee to sign.^(t) Some English cases have

(r) *Tripp v. Bishop*, 56 Pa. St. 426; *Meason v. Kaine*, 67 id. 130; *Sands v. Arthur*, 84 id. 479; *Sausser v. Steinmetz*, 88 id. 324; see also note to this last case in 18 Am. L. Reg., pp. 359 *et seq.*

(s) As allowing specific performance or its equivalent, see *Thomas v. Dickinson*, 14 Barb. 94; *Dix v. Marcy*, 116 Mass. 417; *Johnson v. Moore*, 1 Blackf. 253; *Palmer v. Richardson*, 3 Strobb. Eq. 22; *Whitman v. Lake*, 32 Wis. 193; *Bannon v. Bean*, 9 Ia. 395; *King v. Hanna*, 9 B. Mon. 372; *Frazer v. Ford*, 2 Head, 464; *Drennen v. Boyer*, 5 Ark. 500; *Ex parte Cooper*, 3 M. D. & D. 719; *Teal v. Auty*, 4 Moore, 546, *contra*; see *Johnson v. Hanson*, 6 Ala. 351; *Bates v. Terrell*, 7 Ala. 134; *Bryant v. Mansfield*, 22 Me. 360; *Simms v. Killin*, 12 Ired. 253; *Jones v. Noble*, 3 Bush, 695; *Culligan v. Wingert*, 57 Mo. 242 (and see *Russell v. Berkstresser*, 77 Mo. 417); *Patterson v. Bloss*, 4 La. 377; *Hart v. Clark*, 5 Martin, 614; *Johnstone v. Cowan*, 25 U. C. Q. B. 470; *Ronayne v. Sherrard*, 11 Ir. R. C. L. 146.

(t) See §§ 361 *et seq.* and 388 *et seq.*

taken a middle course, and held that the consideration agreed by parol to be paid for a conveyance of real estate can be recovered only upon a subsequent independent promise; the moral obligation and the previous voidable contract answering as a consideration for the new promise.^(u) The American decisions, however, do not seem to require the subsequent promise, and when all parts of the agreement which affect the obligation of either party to purchase or sell any interest in land have been fully performed, the remaining obligations are no longer within the statute, although they may have been so while the contract continued executory. The statute is satisfied by the voluntary performance by the parties of those undertakings of which it required written evidence.^(v)

§ 741. Where a parol promise to convey lands is the only consideration for a promissory note, there has been some doubt expressed as to whether the consideration is sufficient, and whether the promisee in the note can enforce its payment by tendering a conveyance of the land. In *Drennen v. Boyer*^(w) an extreme view was taken; the agreement, which was by parol, was that the payment of the bond was to precede the conveyance and the court enforced payment. Practically the same point is raised when the maker of a promissory note agrees orally with the holder to discharge his obligation by a conveyance of land. The weight of decision in each case favors the validity of the parol contract as a good consideration in the first instance, and as a good discharge in the second.^(x)

Promise to convey as consideration for a promissory note.

In some cases we find that the parties themselves forestall an action of damages by the vendor's giving a promissory note to be void if he live up to his agreement to convey, otherwise to be valid. The question has arisen whether there is any consideration for the note, or rather whether the void agreement as to the land can be evidence to show what the consideration is. In Connecticut

(u) *Cocking v. Ward*, 1 C. B. 858; 398; *Scott v. Anderson*, 2 Ir. Jur. N. Kelly *v. Webster*, 12 C. B. 283; *Butt-* S. 422; *Edgerton v. Edgerton*, 8 Conn. mere *v. Hayes*, 5 M. & W. 456. 10; *Cooley v. Osborne*, 50 Iowa, 531;

(v) *Wetherbee v. Potter*, 99 Mass. 362. See chapter XXX. *Cassiday v. Askin*, 2 W. N. C. 82, and contra *McCollum v. Jones, Tay.*

(w) 5 Ark. 497. (U. C.) 611; *Farmer v. Simpson*, 6

(x) *Jones v. Jones*, 6 M. & W. 88; *Poulter v. Killingbeck*, 1 Bos. & Pul. Tex. 307. See § 679.

and Missouri this has been allowed, which ruling is supported by the cases just cited; but in Texas the contrary is held.^(y)

§ 742. Where the vendor conveys land as consideration for a promise by vendee to do work, the question of the measure of damages again arises. The element of the Statute of Frauds is, however, eliminated from the case, and the rule laid down is different. The contract being taken out of the statute by the conveyance of the land, the vendor may recover the value of the services promised, or he may recover the value of the land on an implied promise by the vendee to pay for it; or, without declaring for the value of the land, an action of damages for the breach of the contract will be sustained.^(z) Where both sides of the agreement are within the statute, performance by one party will bind the other to pay for the benefit received, but will not compel him to specifically execute his part of the original agreement.^(a)

§ 743. A contract of indemnity or warranty must be distinguished from a contract for the sale of land. In *Beach v. Allen*,^(b) the defendant gave a second mortgage upon a lot having a house upon it, and made an agreement that if that house should be burned and the value of the plaintiffs' mortgage thereby lessened, he would buy the property mortgaged at a price equal to the amount of prior liens. This was held not to be within the Statute of Frauds as a contract to buy land, but that it was a mere agreement to answer for the land's bringing a certain amount at a sale, and if it did not, to buy it himself.^(c)

§ 744. The doctrine of estoppel has already been mentioned as being applicable to real estate. To enforce its principles is without doubt a violation of the express terms of those provisions of the Statute of Frauds which require a writing when realty is involved; but equity, looking as ever to the spirit rather than to the letter of the act, has enforced justice, even though in some measure it might give rise to that uncertainty which the statute was meant to obviate. So long, how-

^(y) *Couch v. Meeker*, 2 Conn. 302; 689; *Gould v. Mansfield*, 103 Mass. 409; *Schnecko v. Meier*, 4 Mo. App. 566; *Wood v. Shultis*, 6 Thompson & Cook, 558. *Weatherly v. Choate*, 21 Tex. 273.

^(z) *Dix v. Marcy*, 116 Mass. 417; *Ly-* ^(b) 7 Han. (N. B.) 442.

man v. Lyman, 133 Mass. 414. ^(c) See also *Weld v. Nichols*, 17 Pick.

^(a) *Hodgson v. Johnson*, E. B. & E. 538.

ever, has this doctrine been applied by courts of equity that the reproach of uncertainty is no longer applicable. The exception is as well established and defined as the rule. It has been the tendency of courts of common law to adopt, in a greater or less degree, equitable principles as fast as they have become moulded into fixed rules, and put on a character of certainty not inconsistent with the exactness of the law. Equitable estoppel has thus been very generally adopted as a rule of law, and its principles are enforced in most of the States in law as well as in equity. In Alabama, however, the doctrine has been excluded even from courts of law, and the same seems to be the case in Michigan and Illinois, while a few scattering cases give this view additional support.^(d) But, however unwise the adoption of this principle by courts of law may have been, it is nevertheless an established fact, and supported by the great bulk of cases under this head.^(e)

What constitutes an estoppel is scarcely within the limits of this work, and but a brief summary of the law on that subject will be given. Mere silence on the part of one not knowing his own rights, or his acquiescence in the acts of another party, will not generally constitute an estoppel, nor can a party make title to land by the oral admissions of his adversary. But where one knowing his own right stands by and lets another party, ignorant of this adverse claim, make substantial improvements, or where by his words or unequivocal acts one person induces another to purchase a poor title, he will not be allowed to set up in himself a better one. He has lost his claim to the land just as truly as though he had conveyed it with all due forms and solemnities.^(f)

(d) *McPherson v. Walters*, 16 Ala. 716; *Girmon v. Davis*, 36 Ala. 591; *Barker v. Bell*, 37 Ala. 359; *Kamphouse v. Gaffner*, 73 Ill. 461; *Winslow v. Cooper*, 104 Ill. 239; *Hayes v. Livingston*, 34 Mich. 387; *Cronin v. Gore*, 38 Mich. 384; *First Nat. Bk. of Kalamazoo v. McAlister*, 46 Mich. 398; *Bryan v. Jamison*, 7 Mo. 110; *Marshall v. Pierce*, 12 N. H. 127; *Den v. Baldwin*, 1 Zab. 395; *Kenyon v. Nichols*, 1 R. I. 419; *Harrison v. Bailey*, 14 Shand, 337.

(e) *Fisher v. Moon*, 11 L. T. N. S. 623; *Brown v. Wheeler*, 17 Conn. 345; *Kea-*

ton v. Jordan, 52 Ga. 308; *Gatling v. Rodman*, 6 Ind. 291; *Junction R. R. v. Harpold*, 19 id. 350; *Campbell v. Mayes*, 38 Ia. 12; *Lillard v. Casey*, 2 Bibb, 459; *Hamlin v. Hamlin*, 19 Me. 145; *Bigelow v. Foss*, 59 id. 164; *Vicksburg R. R. v. Ragsdale*, 54 Miss. 215; *Campbell v. Johnson*, 44 Mo. 251; *Thompson v. Sanborn*, 11 N. H. 201; *Sayles v. Smith*, 12 Wend. 67; *East v. Dolihite*, 72 N. Car. 566; *Clarke v. Vankirk*, 14 S. & R. 354; *Gheen v. Osborne*, 11 Heisk. 67.

(f) *Junction R. R. v. Harpold*, 19

§ 745. Contracts and compromises respecting boundaries form an important exception to the Statute of Frauds. Many of them are supported on the ground of estoppel, and in deciding others the courts have sometimes been misled into assigning the doctrine of estoppel as the ground for them all. These contracts from their very nature are more common in a new country than in one where both in the muniments of title and on the land itself the lines of division have been laid out and recognized for centuries. This exception, then, that we are about to consider is one which owes its development if not its inception to the courts of this country, and our authorities will all be found in our own reports.

The cases make a distinction between disputed boundaries and those not in dispute, or better, perhaps, between contracts which are compromises, and those in which the parties think they have determined the true line; for if a contract, under the pretence of fixing a boundary, really serves to pass property from a man to his neighbor, it is within the Statute of Frauds, and void unless in writing; but where there is an honest difference of opinion between adjacent owners of land(*g*) as to their line of division, the law, favoring the compromise of disputes rather than litigation, will enforce an agreement made between the parties, even if by parol; arguing that in this case the parties hold up to the line so fixed by virtue of their title deeds, and not under the parol transfer. It may then be stated generally that a boundary line in dispute may be settled by a parol agreement, but if it is not in dispute a new line fixed by parol is void under the Statute of Frauds.(*h*)

Ind. 350; *Bigelow v. Foss*, 59 Me. 164; *Leffingwell v. Elliott*, 8 Pick. 455; *Walker v. Dunsbaugh*, 20 N. Y. 173; *Embury v. Conner*, 3 Comst. 518; *Melvin v. Bullard*, 82 N. Car. 39; and generally the cases last cited. In equity estoppel can be established on slighter grounds; *Park v. White*, 4 Dana, 557; *Westfall v. Singleton*, 1 Wash. 228.

(*g*) In all cases, for the agreement to be binding, it must be between the owners of adjacent tracts of lands, and a contract with a mere trespasser is not binding. It has, however, been held in

Arkansas that a public settler, who afterwards acquired title, was competent to make such a contract; *Jordon v. Deaton*, 23 Ark. 708; *Walker v. Devlin*, 2 Ohio St. 606; *Terry v. Chandler*, 16 N. Y. 354; *Lewallen v. Overton*, 9 Humph. 76; *Wright v. Wright*, 2 Baxt. 469.

(*h*) *Alexander v. Wheeler*, 69 Ala. 340; *Smith v. Dudley*, 1 Litt. 67; *Boston & W. R. R. v. Sparhawk*, 5 Metc. (Mass.) 475; *McCaleb v. Pradat*, 25 Miss. 257; *Blair v. Smith*, 16 Mo. 282; *Turner v. Baker*, 64 id. 240; *Trussell v. Lewis*,

In Kentucky the law seems to be somewhat different, and a parol agreement to fix a disputed boundary is not in any sense binding, but it may be used as evidence.⁽ⁱ⁾ Since the only effect given these parol agreements is that of conclusive evidence, in the case of several compromises between the same parties, the last will govern.^(j) It follows also from what has just been said that when the fixing of a boundary is before the court, parol evidence is admissible either to show where the line actually runs, or to identify landmarks mentioned in a deed.^(k)

Having taken this general view of this subject, let us give it that more careful analysis which is demanded as well by its importance as by its intricacy.

§ 746. 1. Disputed boundaries. There must be an actual agreement or compromise, and acquiescence therein by both parties. As regards boundaries about which there is an honest doubt, and which either cannot be exactly ^{Disputed boundaries.} determined or at any rate never are, it is not necessary for the acquiescence to continue long enough to give title under the Statute of Limitations. All that is necessary is that it appear that the contract was mutual, and one which at the time the parties intended to live up to. If the parties act upon the agreement by making improvements and expending money, the case is even stronger than a mere silent acquiescence, although what is done

13 Neb. 418; *Sawyer v. Fellows*, 6 N. H. 107; *Prescott v. Hawkins*, 12 id. 27; *Clough v. Bowman*, 15 id. 511; *Dudley v. Elkins*, 39 id. 84; *Storms v. Snyder*, 10 Johns. 109; *Adams v. Rockwell*, 16 Wend. 311; *Terry v. Chandler*, 16 id. 354; *Vosburgh v. Teator*, 32 N. Y. 565; *Patten v. Stitt*, 6 Roberts. 440; *McAfferty v. Conover*, 7 Oh. St. 103; *Bobo v. Richmond*, 25 id. 122; *McCoy v. Hutchinson*, 8 W. & S. 66; *Hagey v. Detweiler*, 35 Pa. St. 412; *Fleming v. Ramsay*, 46 id. 259; *Fox v. Griffith*, 2 Am. L. Reg. O. S. 572 (S. C. Pa.); *Profit v. William*, 1 Yerg. 91; *Dement v. Williams*, 44 Tex. 159. These illustrate the law with respect to undisputed as well as disputed boundaries. In many of them it is not directly stated whether there was a dispute, and there the law seems to be laid down generally for all boundaries; but a careful study of these cases shows that they concern disputed boundaries, and occasionally there will be a *dictum* to the effect that in cases of undisputed boundaries the decision might be different.

(i) *Robinson v. Corn*, 2 Bibb, 124; *Frowman v. Gordon*, Litt. Sel. Cases, 193; *Phillips v. Eades*, 1 Kent. Law Rept. 425. But such an agreement might be enforced in equity; *Threlkeld v. Winston*, 2 Kent. Law Rept. 63.

(j) *Gray v. Berry*, 9 N. H. 475.

(k) *Raymond v. Coffey*, 5 Oreg. 132; *McCloud v. Mynatt*, 2 Coldw. 163.

may not give rise to an estoppel.^(l) But if either the agreement or the acquiescence is not such as will conclude the parties, it will nevertheless pass a license, and be a good defence to an action of trespass.^(m) Where the boundary though disputed might be accurately ascertained, and in fact the true line is discovered afterwards, the verbal agreement can only be sustained by an adverse possession under the Statute of Limitations, or on the ground of estoppel. The reasonableness of this doctrine is yet more apparent when the parol contract attempts to set up boundaries different from those set forth in a deed.⁽ⁿ⁾

The principles just stated apply equally to cases where, by agreement of the parties, a surveyor or an arbitration committee has fixed a disputed boundary. In these cases, as the parties have not themselves fixed the boundary, the courts require more definite proof of acquiescence.^(o) There are a few cases in which it has been held that a formal agreement is not necessary; but in all of

(l) *Crowell v. Mangha*, 7 Ill. 422; *Cutler v. Callison*, 72 id. 115; *McNamara v. Seaton*, 82 id. 500; *Smith v. Lee*, 14 Gray, 480; *Smith v. Hamilton*, 20 Mich. 438; *Acton v. Dooley*, 74 Mo. 63; *Ord v. Hadley*, 36 N. H. 575; *Van Cortland v. Van Corlaer*, 11 Johns. 127; *Lamb v. Coe*, 15 Wend. 642; *Hunt v. Johnson*, 19 N. Y. 298; *Williams v. Montgomery*, 16 Hun, 51; *Miner v. Mayor of New York*, 37 N. Y. Superior, 188; *Fleming v. Kerr*, 10 Watts, 444; *Dyer v. Yates*, 1 Coldw. 140; *Hefner v. Downing*, 57 Tex. 580; *Perry v. Patterson*, 2 Pug. (N. B.) 369. In *Alexander v. Wheeler*, 69 Ala. 340, there is a *dictum* to the effect that twenty-one years' possession is necessary. There may be other *dicta* to the same effect, but the cases here cited fully support the rule as laid down in the text. The following cases can be explained by the principle stated in the text, although the judges in giving their decisions relied on the doctrine of estoppel; but the majority of cases on estoppel hold that mere acquiescence by one party will not estop him from afterwards setting up

another line; *Goodridge v. Dustin*, 5 Metc. (Mass.) 367; *Goodrich v. Ogden*, 7 Johns. 241; *Edson v. Gager*, 5 Cowen, 386; *Corkhill v. Landers*, 44 Barb. 227; *Gove v. White*, 23 Wis. 283; *Lindell v. McLaughlin*, 30 Mo. 30; *Dolde v. Vodicka*, 49 Mo. 102; *Spears v. Walker*, 1 Head, 168; *Carr v. McCullough*, 1 Kerr (N. B.), 465.

(m) *Reed v. McCourt*, 41 N. Y. 437; *Palmer v. Anderson*, 63 N. Car. 365; *Campbell v. Bateman*, 2 Vt. 177.

(n) *Meyers v. Johnson*, 15 Ind. 262; *Burdick v. Heivly*, 23 Ia. 514; *Brewer v. Boston & W. R. R.*, 5 Metc. 478; *Props. of Liverpool Wharf v. Prescott*, 7 Allen, 495; *Trussel v. Lewis*, 13 Neb. 418; *Dibble v. Rogers*, 13 Wend. 539; *Clark v. Weatherly*, 19 id. 323; *Clark v. Baird*, 9 N. Y. 183; *Baldwin v. Brown*, 16 id. 362; *Chew v. Morton*, 10 Watts, 321; *Gilchrist v. McGee*, 9 Yerg. 460; *McDonald v. McDonald*, 1 Geld. & Ox. 43. See *contra*, *Coleman v. Smith*, 55 Tex. 254 (but the Texas statute does not include "interests in land.")

(o) *Lindsay v. Springer*, 4 Harrington, 547; *Gove v. Richardson*, 4 Greenl.

them an agreement is presumed either from the length of time during which there has been acquiescence, or from acts of the parties sufficient to raise such an inference if not to work an estoppel.(p) It seems probable that no time short of that prescribed by the Statute of Limitations will give rise to the inference of a prior agreement, certainly not where the line set up is contrary to a deed; but a shorter acquiescence may be given in evidence.(q)

§ 747. 2. Undisputed boundaries. Where the boundary is not in dispute, a possession and acquiescence less than the period prescribed by the Statute of Limitations will not pass title, unless there is an element of estoppel in the case.(r) These cases can hardly be called cases of prescription, but the rule is applied by analogy; but where the Statute of Limitations is made the ground of action parol evidence is admissible either to show that land was occupied up to a certain line, or that such holding was adverse.(s) We have already seen that in some

Undisputed
boundaries.

332; *Sweeny v. Miller*, 34 Me. 388; *ton v. Rice*, 8 N. H. 381; *Turner v. Thayer v. Bacon*, 3 Allen, 165; *Byam Baker*, 64 Mo. 236; and *Reed v. Farr*, 35 N. Y. 116, decides the same thing, though it denies the reason assigned in the text.

(q) *Chapman v. Crooks*, 41 Mich. 597; *Davis v. Judge*, 46 Vt. 666; *Ball v. Cox*, 7 Ind. 459; *Gilroy v. Alia*, 22 Iowa, 177; *Jones v. Smith*, 64 N. Y. 180.

(r) *Wakefield v. Roess*, 5 Mason, 23; *Alexander v. Wheeler*, 69 Ala. 340; *Cooper v. Viera*, 8 Pac. Co. L. J. 967 (S. C. Cal.); *White v. Hafeman*, 43 Mich. 268; *Schuyler v. Vedder*, 3 Johns. 12; *McDonald v. McCall*, 10 id. 380; *Hubbell v. McCullough*, 47 Barb. 293; *Smith v. McNamara*, 4 Lans. 175; *Baldwin v. Brown*, 16 N. Y. 362; *Corning v. Troy Iron Factory*, 44 id. 595; *Singleton v. Whitesides*, 5 Yerg. 34; *White v. Everest*, 1 Vt. 188; *Smith v. Bullock*, 10 id. 593; *Brown v. Edson*, 23 Vt. 450.

(p) *Kellogg v. Smith*, 7 Cush. 380; *Ratcliffe v. Gray*, 3 Keyes, 513; *McCormick v. Barnum*, 10 Wend. 109; *Dudley v. Elkins*, 39 N. H. 84; *Ea-*

(s) *Blanc v. Duplessis*, 13 La. 334; *Church v. Burghardt*, 8 Pick. 327.

cases of mere acquiescence the judges have relied on this doctrine of estoppel; those cases were, however, explained. The true rule with regard to estoppel seems to be that there must have been representations intended to mislead, on the faith of which the other party expended money. Mere silence is not enough.(t)

§ 748. Some few cases have arisen in which counsel have attempted to bring contracts with reference to fences within the law regulating boundaries. But a fence, though fixing or showing the boundary, is itself nothing but a building, and is only realty when considered as a fixture; hence contracts concerning fences, whether they be to build or to repair them, are in no manner governed by the Statute of Frauds, and may be oral;(u) but such parol agreements, though good between the parties, do not run with the land and are not binding upon a grantee.(v)

§ 749. The title to real estate may be established by arbitration, and where the submission is under seal or by rule of court there can be no doubt on the subject; the award in the latter case amounting in its quieting effect almost to a judgment.(w) At common law no parol submission to arbitration was valid, and the same doctrine has been held in later times.(x) Even a written submission will not pass title to lands, and where a bond was given to abide by the result it was held that the submission was not binding, but that the losing party could elect to suffer the penalty of the bond.(y)

But though the submission to arbitration does not work as a conveyance, yet the transaction will take effect as an estoppel, and

(t) *Simmons v. Munford*, 2 R. I. 188; *U. C. C. P.* 512; *Hitchcock v. Tower*, 17 *Halloran v. Whitcomb*, 43 *Vt.* 312; *Reporter*, 63 (S. C. *Vt.*)

Combs v. Cooper, 5 *Minn.* 259; *Warner v. Fountain*, 28 *Wis.* 413. In *Hayes v. Me.* 339.

(w) *Page v. Foster*, 7 *N. H.* 394; *Goodridge v. Dustin*, 5 *Metc.* 363. (x) *Walters v. Morgan*, 2 *Cox*, Ch. 369; *Valentine v. Valentine*, 2 *Barb.* Ch. 437; *German v. Machin*, 6 *Paige*, Ch. 292; *Gratz v. Gratz*, 4 *Rawle*, 436; *Pike v. Wilt*, 104 *Mass.* 598; *Philbrick v. Preble*, 18 *Me.* 257; *McMullin v. Mago*, 8 *Sm. & Mar.* 298; *Miller v. Graham*, 1 *Brev.* 448.

(y) *Den v. Allen*, 1 *Penning*. 34.

without passing title will preclude either party from asserting it in opposition to the award.(z) There are some cases, however, in which a parol arbitration in matters concerning land is good, as where the title could be transferred by parol, or in many instances where the act conferring title has been accomplished, and the only thing to determine is the exact land conveyed or damages therefor.(a) But the obligation to convey the land must be binding; it is not the award in such cases that passes the title, even if it be in writing.(b)

§ 750. At common law an exchange of lands within the same county was good by parol, neither livery of seisin nor a deed being necessary; provided, of course, that possession was taken by both parties.(c) The Statute of Frauds, however, applied to exchanges, a writing now being required, and declarations of a parol exchange cannot be proved.(d) It is not enough that title bonds are exchanged and possession taken;(e) and the United States Supreme Court(f) went so far as to hold that an instrument executed before a notary, reciting a consideration of land received, and conveying other land, running in the first person and signed by the party conveying this tract, was not binding upon the other parties who also put their signature to it. It was not a properly executed exchange. In *Hitchcock v. Hicks*(g) Lord Kenyon is reported to have ruled that no action could be maintained on the warranty always implied in an exchange, when the exchange had not been evidenced by a writing.

In Pennsylvania the writing is not required, and a parol exchange followed by possession taken in pursuance thereof is a good transfer. In fact the doctrine of enforcing parol exchanges was carried even further in a case,(h) in which it was held that where a parol exchange was followed by a corresponding possession

(z) *Shelton v. Alcox*, 11 Conn. 243; *Brown v. Wheeler*, 17 Conn. 353; *Carey v. Wilcox*, 6 N. H. 177; *Cox v. Jaggard*, 2 Cow. 650; *Crabtree v. Green*, 8 Ga. 19.

(a) *Evans v. McKinsey*, Litt. Sel. Cases, 264; *La Crosse & Milwaukee R. v. Seeger*, 4 Wis. 273; *Brown v. Burkenmeyer*, 9 Dana, 161.

(b) *Rice v. Rawlings*, Meigs, 496; *Wilks v. Davis*, 3 Mar. 509.

(c) *Shep. Touch.* 294; Litt. §§ 51, 52, 62; *Lindale v. Coats*, 1 Hamm. 243; *Cass v. Thompson*, 1 N. H. 66.

(d) *Stark v. Cannady*, 3 Litt. 402; *Jackson v. Cris*, 11 Johns. 437.

(e) *Connor v. Tippet*, 57 Miss. 595.

(f) *Preston v. Keene*, 14 Pet. 135.

(g) Cited in *Espinasse's Rep.* 163.

(h) *Lee v. Lee*, 9 Pa. St. 177.

of one of the tracts exchanged and a subsequent sale of that tract, which put it out of the power of the plaintiff to reinstate the previously existing relation of the parties, the performance was sufficient and the exchange would be enforced. There was, however, in this case an assessment of the other tract exchanged in the name of the other party and payment of taxes by him, which, it was said, was tantamount to an actual possession.⁽ⁱ⁾ In Kentucky, prior to its admission as a State and the passage of its Statute of Frauds, it was held that conveyance of one tract under a parol exchange was a good part performance.^(j) In Ohio, on the other hand, a territorial statute required lands to be conveyed by deed, which cut out parol exchanges even with possession taken, and an Indiana case has held parol exchanges void under circumstances that would seem to have justified the application of the doctrine of part performance, and in doing this were obliged to overrule the decisions formerly governing the law in that State.^(k) It seems, however, that possession taken under a parol exchange will ripen into a good title under the Statute of Limitations.^(l)

Where one party has performed his part it would be manifestly inequitable to give him neither restitution nor specific performance; and in a recent Mississippi case the former was decreed, although the defence made was that, the whole transaction being void under the Statute of Frauds, no action would lie.^(m)

§ 751. A gift of land *inter vivos* must be in writing, otherwise it will not be specifically enforced, and improvements made without the donor's assent or request will not affect the case.⁽ⁿ⁾ Although a Kentucky case has held that where a son accepted the homestead as a gift, lived on it and worked the land, he was entitled to a lien for his services, and could use the oral contract as a defence and hold the land till repaid.^(o) In one regard a parol gift of land is of more force than a parol sale; in the latter case possession taken, if adverse at all, is only as to so much of

(i) See *Christy v. Barnhart*, 14 Pa. St. 262; *Miles v. Miles*, 8 Watts & Serg. 135; *Taylor v. Henderson*, 38 Pa. St. 61; *Big Mountain Improvement Co.'s App.*, 54 Pa. St. 370.

(j) *Carrington v. Brents*, 1 McLean, 176.

(k) *Lindsley v. Coats*, 1 Hamm. 243; *Sands v. Thompson*, 43 Ind. 18.

(l) *Bartlett v. Secor*, 56 Wis. 520.

(m) *Dickerson v. Mays*, 60 Miss. 388.

(n) *Johnson v. Jordan*, 22 La. Ann. 486; *Hubbard v. Allen*, 59 Ala. 298; *Curlin v. Hendricks*, 35 Tex. 244.

(o) *Spears v. Sewell*, 4 Bush, 240.

the land as is absolutely occupied; but where possession is taken in consequence of a parol gift it gives rise to a claim by color of title, so that the prescription extends to the whole of the colorable title and not merely to the *pedis possessionem*.(p)

§ 752. Land may be given to the public, that is, dedicated to the use of the public, without any writing; and a dedication once made and accepted cannot be revoked. It rests upon the doctrine of estoppel *in pais*.(q) The rule thus laid down must be strictly followed.(r) True, there need be no writing,(s) but a dedication must be proved either by parol declarations or by acts and circumstances which are inconsistent with a contrary conclusion; the acts must be clear and unequivocal, and it has been held that mere acquiescence in the use of the public, without more, will not presume a grant or estop the owner from asserting his title in the land; but the more correct view seems to be that if the assent of the owner has been so long continued that public accommodation would be affected by the interruption of the enjoyment, the right of the owner is barred.(t)

What acts amount to a dedication cannot be stated in a word, yet a few examples will show the general tendency of decision. Where the owner of a lot stated publicly that it might be used as a cemetery, and suffered it to be fenced and exclusively used for such purpose for a number of years, it was held that there was a

(p) *Rannels v. Rannels*, 52 Mo. 112; *Griffey v. Bryars*, 7 Bush. 473; *Rector v. Hartt*, 8 Mo. 448; *Noyes v. Chapin*, 6 Wend. 464; *Baker v. Brannan*, 6 Hill, 47; *Carter v. Portland*, 4 Oreg. 343; *Rhea v. Forsyth*, 37 Pa. St. 508; *Pott v. School Directors*, 42 id. 141; *Lawton v. Tison*, 12 Rich. 100; *Skeen v. Lynch*, 1 Rob. (Va.) 191. (q) *Chapman v. School Dist.*, *Deady's Rep.* 151; *Vick v. Mayor of Vicksburg*, 1 How. (Miss.) 429; *Connelan v. Ford*, 9 Wis. 244; *Chicago v. Johnson*, 98 Ill. 618; *Graham v. Hartnett*, 10 Neb. 517; and *State v. Guernsey*, 9 Mo. App. 313, deciding that mere acquiescence for fifteen years will not establish a dedication, and *Campbell v. O'Brien*, 75 Ind. 222, deciding the contrary.

(r) *Valley Pulp Co. v. West*, 17 Nor. W. R. 554 (S. C. Wis.)

(s) *Cook v. Harris*, 61 N. Y. 453.

(t) *City of Cincinnati v. White*, 6 Pet. 440; *Doe v. Attica*, 7 Ind. 643; *Bidinger v. Bishop*, 76 id. 257; *Trustees of Dover v. Fox*, 9 B. Mon. 201;

good dedication.(u) The question often arises where one laying out an addition to a town sets aside portions for streets, alleys, parks, and the like, and includes them in his maps and advertisements. In this case the public will acquire no interest therein until some decisive and irrevocable act renders it improper and unjust for the grantor to deny the public use and character of his improvements. As, however, a sale of any of his lots would bind him, it may be generally stated that making the map constitutes a good dedication.(v) If the map is not one of the grantor's own making, or if, for the purpose of defining the position of other land, he puts down on a map a disputed street, he is not estopped.(w) The dedication must be to the public; and where land is granted for the use of a corporation or an individual, the Statute of Frauds must be taken into account. Thus it has been held that there cannot be a parol dedication to a railroad (although it was suggested that the attempted gift might be enforced in equity as a declaration of trust); and where adjoining owners agreed to keep open an alley, which had but one outlet, it was held that the public was not interested, and the grant could not be considered as a dedication.(x)

We have seen that there must be an intention to dedicate, evidenced either by a direct grant or by unequivocal acts, and that the dedication must be to the *public*. One other element is necessary to make the parol dedication binding—it must be accepted by the public within a reasonable time, and that under the conditions expressed by the grantor; prior to acceptance a verbal dedication is a mere license.(y) Compliance with conditions constitutes a good acceptance, and the same is true where a city enters into a contract for the improvement of a dedicated street. Where a State dedi-

(u) *Pierce v. Spafford*, 53 Vt. 394.

(v) *Vanatta v. Jones*, 42 N. J. L. 563; *Bayonne v. Ford*, 43 N. J. L. 292; *Stange v. Dubuque St. R. R.*, 54 Ia. 669; *Territory v. Deegan*, 3 Mont. 82.

(w) *Gardner v. Jersey City*, 32 N. J. Eq. 586; *Meredith v. Sayre*, 32 N. J. Eq. 558. In *Bloomfield v. Ketcham*, 25 Hun, 222, it was held that a map made by the executors did not bind the heirs, while in *In re Sixty-seventh Street*, 60

How. Pr. 264, in a case concerning the same estate, it would seem that the contrary was held.

(x) *I. C. R. R. v. I. & I. C. Ry. Co.*, 85 Ill. 211; *Talbott v. R. & D. R. R.*, 31 Grattan, 685.

(y) *Turner v. Stanton*, 42 Mich. 506; *Cass Co. Supervisors v. Banks*, 44 Mich. 468; *Corwin v. Corwin*, 24 Hun, 147; *Boughner v. Clarksburg*, 15 W. Va. 394.

cates land, no distinct acceptance by the people is necessary; the dedication and acceptance are both included in the act of the State.^(z) If a long time elapses before the dedication is disputed, less rigid proof of it is required. B. laid out a new town, and marked a portion "for the Lutheran Church;" but no church was built, though a school-house was erected upon the lot, and a portion of it was used as a graveyard; the Lutheran society was never incorporated. After the death of the grantor, and admissions by his heirs, the dedication was not interfered with.^(a)

§ 753. A partition is a transfer of title, and as such void by parol. There is a rather curious Kansas case,^(a') which can be accounted for under this principle; while the Partition. member of a town lot association owned his share, a drawing took place under which the different lots were assigned to the shares. It was held that parol evidence of such drawing and assignment was insufficient under the Statute of Frauds. A Mississippi case^(b) seems to take it for granted that a parol partition is valid, but the expression is a mere *dictum*. It was there said that a contract between plaintiff and defendant in ejectment, by which judgment was to be entered generally for the plaintiff, but by which the execution was to be restricted to a part only of the tract, the title to that being conceded, was not a contract for the sale or transfer of land, but a parol partition. The judgment in this case was doubtless correct, but in volunteering an explanation the learned judge fell into an error.

§ 754. Title to real estate cannot be destroyed any more than it can be created by oral testimony. It is equally against the spirit, at least, of the Statute of Frauds.^(c) A promise Surrender of title. to waive a contract for the sale of land is within this

(z) *St. Louis v. Meier*, 8 Mo. App. 579; *Lebanon v. Warren Co.*, 9 Ohio, 80; *R. R. Co. v. Carthage*, 36 Ohio St. 631; *Reilly v. Racine*, 51 Wis. 527. *Benedict*, 57 id. 121; *Porter v. Stone*, 1 N. W. Rep. 601 (S. C. Iowa); *Union R. W. v. Dyche*, 28 Kan. 200; *Vreeland v. Torrey*, 4 N. J. L. Jour. 343; *McCarthy v. Whalen*, 9 N. Y. W. Dig. 315; *De Witt v. Ithaca*, 7 id. 533; *Tupper v. Huson*, 1 N. W. Rep. 332 (S. C. Wis.); *In re Peck*, 1 Can. Law Times, 611.

(a) *Beatty v. Kurtz*, 2 Peters, 578. See, also, on the general subject of dedication, *Turner v. Walsh*, L. R. 6 App. Cas. 636; *Grogan v. Hayward*, 4 Fed. Rep. 161; *U. S. v. Carr*, 3 Sawyer, 477; *Chicago v. Thompson*, 9 Bradw. 524; *Bidinger v. Bishop*, 76 Ind. 247; *Baldwin v. Herbst*, 54 Iowa, 168; *Getchell v. (a') Wiswell v. Tefft*, 5 Kan. 266. (b) *Natchez v. Vandervelde*, 31 Miss. 719. (c) *Freret v. Meux*, 9 Rob. 416

principle, and invalid by parol. (d) The Supreme Court of Michigan was divided on the question whether the rights of one who had bought his debtor's land at execution sale, but who took no sheriff's deed, were divested by his receiving the amount of his bid and interest after the statutory period for the debtor to redeem had expired. But the doubt in this case probably arose from the question whether the interest of the vendor was real estate, and not whether such interest could be divested by an oral agreement. (e) An Indiana case recently decided that a parol promise made by a purchaser at a sheriff's sale to extend the time of redemption is binding. (f) An old English case is somewhat similar, and illustrates the point just contended for; (g) it was there held that an abandonment of a mere possessory title may be by parol. A Kentucky case (g') must be distinguished. It was there held that an abandonment of land by vendee could be proved by parol, but it appears that the original sale was in writing, and provided that in case the vendee was dissatisfied he could give up the land and receive compensation for his improvements. The original writing, by referring to the rescission and providing for it, supplied the place of written evidence to prove the subsequent act.

§ 755. We pass from the consideration of contracts which affect the title to land to those which arise collaterally upon the sale of land without directly affecting the title. These cases from their nature are not included within those provisions of the Statute of Frauds which relate to land, yet they lie so near the border, and the attempt is so often made to bring them within the statute, that it is necessary to consider them in this connection. Most of these agreements are concerning the price of land, where, as supplementary to the written contract, or even the deed, it is verbally agreed that, if there be an excess or deficiency in the quantity of the land sold, the price shall be

Hereford v. Police Jury, 4 La. Ann. 172; Massey v. Hachett, 12 id. 56; Brant v. Livermore, 10 Johns. 358; Jackson v. Cary, 16 id. 302; Jackson v. Miller, 6 Cow. 751, affirmed in 6 Wend. 228; Jackson v. Post, 15 Wend. 593; Paull v. Mackey, 8 Watts, 125; Suttle v. R. R., 76 Va. 234. The doctrine of part performance, of course, applies to the surrender of title as well as to the creation; Pope v. O'Hara, 48 N. Y. 452. See chapter XXXIV. .

(d) Goucher v. Martin, 9 Watts, 109.
 (e) Whiting v. Butler, 29 Mich. 122.
 (f) Rector v. Shirk, 18 Cent. L. J. 59.
 (g) Onderdonk v. Lord, Hill & D. Supp. 129.
 (g') Washington v. McGee, 7 Mon. 132.

changed accordingly. Such parol agreements have been sustained, whether made before the written contract of sale or at the same time, or subsequent to the whole transaction.^(h) In an early Connecticut case⁽ⁱ⁾ parol proof of such an agreement was excluded, not, however, on the ground of the Statute of Frauds, which was urged by counsel, but because the whole transaction had been by deed and note. In Alabama^(j) the court took a different view of the matter and admitted parol evidence in an exactly similar case, and the weight of decision seems to be on this side.^(k)

The same question is presented, though in a somewhat different light, when the vendor verbally warrants the amount of the tract sold. In this case the Statute of Frauds does not apply, although in some cases evidence of the parol warranty may be rejected as contradicting the deed.^(l) Somewhat similar to the cases just discussed are those where, at the time of a sale of lands, the vendor orally agrees to pay the taxes for a certain time to come, or the vendee, on the other hand, agrees to pay taxes already accrued and due. In either case the promise forms part of the consideration, and neither contradicts the deed, nor comes within the provisions of the Statute of Frauds.^(m) But where the vendee has paid the taxes, he will not be permitted to show that the vendor orally agreed to pay them.⁽ⁿ⁾

(h) *Mott v. Hurd*, 1 Root, 74; *Gillett v. Burr*, cited in 1 Root, 74; *Green v. Vardiman*, 2 Blackf. 331; *Parker v. Siple*, 76 Ind. 350; *Hark v. Wilson*, 3 Bibb, 476; *Nickerson v. Saunders*, 36 Me. 413; *Howe v. O'Mally*, 1 Murphey, 289; *Boyett v. Vaughan*, 79 N. Car. 531; *Garrett v. Malone*, 8 Rich. Law, 337; *Carscaden v. Shore*, 17 U. C. C. P. 497. In *Falconer v. Garrison*, 1 McCord, 109, the agreement that the price should be regulated according to the acreage of the tract, was made prior to the deed, and after six years it was held that the oral agreement could not vary the terms of the deed, but that it had been merged in the latter.

(i) *Northrop v. Speary*, 1 Day, 23.

(j) *Hussey v. Roquemore*, 27 Ala. 288.

(k) *Thayer v. Viles*, 23 Vt. 497; *Kitchen v. Boon*, 24 Grant, Ch. 197.

(l) *Schrivver v. Echenrode*, 94 Pa. St. 456; *Benjamin v. Zell*, 12 W. N. C. 249; *Morehead v. Murray*, 31 Ind. 418; and *Cabot v. Christie*, 42 Vt. 125, in which it was said the parol warranty could not beset up as against a deed.

(m) *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549; *Carr v. Dooley*, 119 Mass. 296; *Remington v. Palmer*, 62 N. Y. 34. These cases must be distinguished from those in which the whole contract is by parol, and the contract being entire, the stipulation with regard to the incumbrances falls with the rest. See chapter on "Severability."

(n) *Headrick v. Wisheart*, 41 Ind. 87.

§ 756. A promise to a real estate broker to pay him for negotiating a sale or a purchase of land is not within the Brokers' commissions. Statute of Frauds, be the promise to pay a sum certain or a sum proportional to the price. The broker has no interest in the land either before or after the transaction, and the promise is merely one to pay for work and labor.(o) There seems to be some ground for saying that the same rule holds good where the broker is to receive as his reward a portion of the land ;(p) though there is no direct authority in support of this point.(q) A New York case(r) furnishes us, however, with a strong analogy. It was there said that where a broker agreed to take a portion of the land as his compensation he could not, upon refusing to take a deed, recover his compensation in money. Another case in the same State,(s) though apparently inconsistent with this view, can be distinguished. In that case the plaintiff was really but a broker, but the letter of the agreement seemed to make him a purchaser ; and the court consequently held that the original agreement, being by parol, was invalid as affecting an interest in land.(t) That the broker has no interest in the land is shown conclusively by the fact that his work is ended as soon as he has brought the parties to an agreement, whether the agreement is reduced to writing or not ; he is then entitled to his brokerage, even though the sale may never be consummated.(u)

We have seen from the case of *Badenhop v. McCahill*, which

(o) *Hosford v. Carter*, 10 Abb. Pr. 453 ; *Harben v. Congdon*, 1 Coldw. 221 ; *Robinson v. Hathaway*, 4 West. L. M. 107 ; *Watson v. Brightwell*, 60 Ga. 213 ; *Lesley v. Roesen*, 39 Miss. 372 ; *Heyn v. Phillips*, 37 Cal. 529 ; *White v. Curry*, 39 U. C. Q. B. 569.

(p) If there is a writing it must of course contain the word "heirs," or only a life estate will pass ; *Gray v. Packer*, 4 W. & S. 17.

(q) This point has been ruled affirmatively in Texas, but the statute of that State does not contain the phrase "or interest therein ;" *Anderson v. Powers*, 59 Tex. 213.

(r) *Bailey v. Gardner*, 6 Abb. New Cases, 150.

(s) *Badenhop v. McCahill*, 42 How. Pr. 195.

(t) The facts of this case were as follows :—The defendant said to plaintiff that he might have the refusal of defendant's house. That plaintiff was to sell it and defendant would make the deed to plaintiff, and that he, plaintiff, should make over the property to the purchaser. That the plaintiff was to give the defendant \$30,000 for the property and have \$300 for himself. The plaintiff effected a sale for \$31,500 and, upon the defendant's refusal to perform his contract, brought suit for his \$300 and also the \$1500 advance.

(u) *Dennis v. Charlick*, 6 Hum, 22 ; *Barnard v. Monnot*, 40 N. Y. 204 ; *Houston v. Boagni*, 1 McGloin, 165.

we have just considered, that the courts are not inclined to support any contract arising upon the sale of land which affects in any manner an interest in the land. This tendency is shown even more strongly where plaintiff agrees to procure a conveyance of lands from a third person to defendant, or even to complete a title, by invalidating liens or adverse claims. The fact that the plaintiff has no interest in the land does not take such a case out of the Statute of Frauds; because such contract is always to make a good title whether the promissor has one or not.(v)

It is often difficult to distinguish these cases from those where the middleman merely plays the part of a broker. A satisfactory rule, and one which the cases seem to sanction, is that where the broker merely attempts to find a customer or seller, his duty is done when that is accomplished, and the sale of the land is a matter in which he has no interest; but where he guarantees either to sell or buy the land for his client, his contract is one relating to land, and within the provisions of the Statute of Frauds.

§ 757. A contract to obtain title from the Commonwealth or from the United States, is an exception to the principle last stated. Such a case arises where one promises to procure a patent for the joint benefit of himself and another, or where several go into the public domain to search and explore for mines, with the agreement to occupy and develop in common such discoveries as may be made.(w) The attempt has been made to explain this exception by calling it a contract for work and labor; but we prefer to follow the learned judge in *Davis v. Walker*, who doubted the exception in principle but laid it down as authority.(x)

Agreements
between
squatters.

§ 758. A contract to furnish material or to do work, even if in connection with real estate, does not come within the fourth section of the Statute of Frauds.(y) And this rule has been applied where the work was to over-

Contracts for
material and
labor.

(v) *Horsely v. Graham*, L. R. 5 C. P. 13; *Noyes v. Moore*, 1 Root, 143; *Mather v. Scoles*, 35 Ind. 3; *Duvall v. Peach*, 1 Gill, 181; *Rawdon v. Dodge*, 40 Mich. 697; *Voy v. Weir*, 9 U. C. C. P. 487.

v. Ennis, 2 Col. 304; *Ratliff v. Trout*, 6 J. J. Marsh. 606; *Watkins v. Gilkerson*, 10 Tex. 340; *Evans v. Hardeman*, 15 Tex. 482; *Miller v. Roberts*, 18 Tex. 19; *Smith v. Crosby*, 47 Tex. 130.

(w) See § 727.

(y) *Jeakes v. White*, 6 Exch. 878;

(x) *Davis v. Walker*, 4 Hayw. 295; *Halbut v. Forrest City*, 34 Ark. 254; *Smith v. Brooks*, 3 Hayw. 248; *Murley* Page v. Monks, 5 Gray, 495; *Chand-*

see a farm, and the compensation was a share in the crops.(2) It has, however, been held that an agreement to farm on shares is for an interest in land.(a) But where the agreement to farm on shares was rescinded, and the defendant, in consideration of taking the whole crop, promised to pay the plaintiff for his labor, it was held that the latter promise was not within the Statute of Frauds.(b)

A contract to pay for labor to be done being good notwithstanding the Statute of Frauds, it follows *a fortiori* that where the work is already done, a promise to pay for it is valid. Such a case arises where one promises to pay for improvements made by promisee.(c) The agreement to pay for labor to be done is enforceable even if made at the same time as a lease, provided it is a separate contract and does not contradict the writing.(d)

Many other cases arise in which the attempt is made to set up the statute on the ground that an interest in land is dealt with in a contract; they are so diversified, and in most instances the attempt is so absurd, that a classification of them is unnecessary as well as impossible. Although the tendency of the courts seems to be to give the statute full force when an interest in lands is concerned, and to restrict the exceptions already established, yet the courts are averse to extending the field of the statute to cases where the interest in land, if any, is doubtful, contingent, or remote. This sentiment was expressed by Chief Justice Cockburn in a case(e) in which it was attempted to bring a contract for lodging within the statute: "The decisions under the fourth section of the Statute of Frauds have gone quite far enough, and it would lead to most absurd and inconvenient consequences were we to hold that such a case as this falls within the statute." Mr. Justice Crompton expressed himself as agreeing with the Chief Justice, that to hold such a con-

ler v. DeGraff, 22 Minn. 471; Bridge-
man v. Wells, 13 Ohio, 47; Hamilton
Co. v. Cincinnati R. R., 29 Ohio St.
345; Coleman v. Chester, 14 S. Car.
288; Forbes v. Hamilton, 2 Tyler, 357.
(2) Hinesworth v. Edwards, 5 Har-
ring. 377; Lorenz v. Heffernan, 3 Vict.
L. R. Eq. 129. But see contra, Ho-
gan v. Berry, 24 U. C. Q. B. 348.

(a) Delaney v. Root, 99 Mass. 549;
Comstock v. Ward, 22 Ill. 248.

(b) Moore v. Ross, 11 N. H. 547.

(c) Frear v. Hardenbergh, 5 Johns.
272.

(d) McCormick v. Cheevers, 124 Mass.
263; Mann v. Nunn, 43 L. J. C. P. 243;
Townsend v. Peasley, 35 Wis. 388.

(e) Wright v. Stavert, 2 E. & E. 727.

tract to be one for an interest in land would be to carry the decisions much further than was right.(f)

The same tendency can be seen in the following cases: A promise that if plaintiff, who was manager of a colliery, should retire from connection with it, defendant would pay him £50 "for any interest he might have in the colliery and for his services," was held not to be within the statute, as no interest in the colliery was proved at the trial.(g) In a case in Maine(h) it was said that a promise by an undisclosed principal, in a land speculation, to indemnify the plaintiff who went surety on the note of the agent, given in payment for the land, was not within the Statute of Frauds, for the plaintiff was not supposed to know what was done with the notes which he endorsed. It was likewise held that a subscription paper for the building of a church was not within the statute, and that, therefore, no consideration need be expressed.(i)

§ 759. The law of Pennsylvania regulating executory contracts for the sale of land, or those only partially executed, presents some striking and instructive peculiarities due to the but partial adoption into that Commonwealth of the English Statute of Frauds. It was adjudged by the colonial court of that State in the oldest case reported in its books, that the Statute of Frauds and Perjuries did not extend to that province, though made before Penn's charter; the governor of New York having exercised a jurisdiction there before the making of that statute.(j)

Distinctive
Pennsyl-
vania legis-
lation.

It was not until as late as 1772 that a Pennsylvania Statute of Frauds was passed. At that time the Colonial Assembly condensed into one the first three sections of 29 Car. II., and placed it on the statute books. The fourth section was omitted, whether purposely or not cannot at this late day be determined. Chief Justice Tilghman stated very plainly as his opinion that the omis-

(f) The same conclusion, with reference to boarding and lodging, has been reached in this country; *Wilson v. Martin*, 1 Denio, 605; and see *Pierce v. Woodward*, 6 Pick. 208, as illustrating the same principle.

(g) *Cheadle v. Proctor*, 19 L. T. N. S. 291.

(h) *Smith v. Sayward*, 5 Greenl. 504.

(i) *Barnes v. Perine*, 15 Barb. 250. In New York, in contracts within the Statute of Frauds which are not under seal, a consideration must be expressed; *Kerr v. Shaw*, 13 Johns. 237. See chapter XIX.

(j) *Anon.*, 1 Dall. 1; *Bell v. Andrews*, 4 id. 152. See § 2.

sion could not have been accidental, seeing that from the close conformity of this statute with the English the legislature must have had before them the older statute. Mr. Justice Sharwood added the weight of his opinion to the same side of the controversy. But we find opposed to this view the decision of Chief Justice Gibson in *Pugh v. Good*, where he says: "I am inclined to think that no difference of enactment betwixt the British statute and our own, with regard to executory sales of land, has been suspected, * * * and I would hold the particular clause in the fourth section of the British Statute of Frauds to have been extended here by adoption, had not this court, very inconsistently I think, held it otherwise in *Bell v. Andrews*. As it is, we must take that clause with its equitable exceptions to be part of our peculiar common law adopted in analogy to the British statute."^(k)

Notwithstanding the desire of Chief Justice Gibson to incorporate within "our peculiar common law" the provisions of the fourth section which relate to contracts for the sale of land, those provisions are not now and never have been, with the exception of a period between two consecutive sessions^(l) of the General Assembly, accepted as law in that Commonwealth. And it is the effect this omission has had on Pennsylvania law that we are about to examine. The result of the legislation in that State has been to prevent titles from vesting by parol; the contract of sale is not forbidden, and for some purposes is sustained.^(m) Thus it has been held that evidence of a parol contract of sale can be given in order to show privity between parties to establish a chain of adverse possession.⁽ⁿ⁾

§ 760. But the most important consequence of the oral contract not being forbidden is, that an action of *damages* can be sustained for its breach. The policy of discouraging such contracts has always prevailed, and in the early cases especially the damages given were merely nominal,

(k) *Bell v. Andrews*, 4 Dall. 152; *Gunnigle v. Thornton*, 10 S. & R. 252; *Bowser v. Cessna*, 62 Pa. St. 150; *Pugh v. Good*, 3 W. & S. 59, 60. See, for a collection of authorities on this point, as well as for a general treatment of the distinctive legislation in Pennsylvania, 2 Whart. on Ev., § 865, note.

(l) 1856 and 1857.

(m) *Ewing v. Tees*, 1 Binn. 450; *Mc-*

(n) *Cunningham v. Patton*, 6 Pa. St. 357.

and as a consequence the actions were not frequent. An unfortunate departure by the Supreme Court, in *Jack v. McKee*, from the old rule of calculating damages, made it more of an object to bring these actions, and since then their number has increased; and although the Supreme Court, in *Hertzog v. Hertzog*, returned to the beaten track, yet the confusion resulting from the contradictory decisions did not cease immediately upon the re-establishment of the old rule.(o)

§ 761. The most important consideration arising under this doctrine is that of the measure of damages. In the first Measure of cases on the subject, no distinct rule can be found, damages. though the determination of the court to make the damages small is apparent. In *Ewing v. Tees*, the verdict was for less than \$300, while the full amount or value of the contract was \$6366.67. In this very case, Chief Justice Tilghman gives utterance to these principles, and adds that there is also less danger of perjury, because these actions are limited so that they must be commenced within six years. In *Whitehead v. Carr*, Mr. Justice Huston, after stating that the damages will often be very small, goes even further, and says that still it is a question in what case and under what circumstances an action will lie. In *Ellet v. Paxson*, Mr. Justice Kennedy contends for small damages, and severely censures a jury for giving damages which seemed to him enormous and altogether unreasonable. The amount of the purchase-money named in the parol contract was \$15,000, and the verdict was for \$6500. "It is true," said his Honor, "to be sure, that the action was brought to recover the whole amount of the purchase-money, which exceeded greatly the amount of the verdict; but as a recovery of the purchase-money would have been in effect an enforcement of a specific performance of the contract, the learned judge, before whom the trial was had, very properly ruled, that as the contract declared on was verbal and therefore within the provisions of the act against frauds and perjuries, the plaintiffs at most were only entitled to recover

(o) See *Jack v. McKee*, 9 Pa. St. 235, *Hertzog v. Hertzog*, 34 Pa. St. 419, for a opinion by Rogers, J., for a defence of the new rule for calculating damages, and the dissenting opinion of Woodward, J., in *Malaun's Adm. v. Ammon*, 1 Grant, 123, adopted and reported in

damages equal to the loss actually sustained by a non-fulfillment of the contract." In *Irvine v. Bull*, Chief Justice Gibson held a conditional verdict, in an action for damages on the breach of a parol contract for the sale of lands, bad because unquestionably it was intended not to give damages, but to compel specific execution of the contract.(p) From these cases, and many others might be added, it appears that although there was no settled rule by which damages were to be computed, yet the whole tendency of the court was to keep them low, giving to the plaintiff mere indemnity—compensation for what had been paid or done, and restoring the parties as nearly as could be to their position prior to the contract.(q)

The rule has been applied in a late case with great strictness. There was an oral agreement to let ten acres of oil land; when the lease came to be executed the lessee found that it was for but five acres; the lessor, however, assured him that if the first well was a success he would make him a lease for the other five acres. After spending \$10,000 on the first tract, the lessee sold out his lease for twice that amount, and on the refusal of his lessor to let him the other tract brought an action for damages. The lower court charged that the measure of damages was one-half the cost of sinking the first well, but the Supreme Court reversed this ruling on the ground that no expenses had been incurred on the second tract, and those on the first had been well repaid; and that, therefore, nominal damages only should be given.(q')

It is plain from these cases that damages were given not to enforce the contract but in disaffirmance of it, and it follows *a fortiori* that specific performance of the contract could not be compelled by either party under the cover of a suit for damages, unless the circumstances of the case were such as would justify a cancel-

(p) Though in a later case it was hinted that the compensation for the breach of an invalid parol contract might be had by a conditional verdict; *Postlethwaite v. Frease*, 31 Pa. St. 472. These conditional verdicts were the substitutes formerly used in Pennsylvania in default of a court of chancery, to answer the purpose of the proper machinery of equity.

(q) *Ewing v. Tees*, 1 Binn. 450; *Whitehead v. Carr*, 5 Watts, 368; *Ellet v. Paxson*, 2 W. & S. 433; *Irvine v. Bull*, 4 Watts, 289. And see the opinion of Woodward, J., in *Hertzog v. Hertzog*, 34 Pa. St. 418, and his annexed opinion in the case of *Malaun v. Ammon*, for a careful summary of the law regulating damages.

(q') *McCafferty v. Griswold*, 99 Pa. St. 270.

lor in decreeing it. In the case of an action for damages by the vendee specific performance could only be had by a conditional verdict, which we have seen is not allowed; but if the action was by the vendor, a verdict for damages to the amount of the purchase-money would have been a virtual enforcement of the contract, and for the same reason is denied by the courts.^(r)

Another class of cases arose, which though in reality depending on the same principle as those just reviewed, nevertheless received at first a different interpretation, and were furnished with a separate rule for calculating the damages. These cases were actions by a promisee who was to do work for the promisor, and be repaid by a conveyance (generally a devise) of land by the latter. The only point to be decided, after the establishment of the contract, was whether the amount of damages should be fixed with reference to the value of the work or the value of the land. In *Jack v. McKee* Mr. Justice Rogers, in delivering the opinion of a unanimous court, laid down the rule that the value of the land was the only measure of damages, and contended strongly for it both on principle and authority. This, says he, is the *stipulated reward* of the services, whatever may be the intrinsic value. It is the contract, and, of course, binding on both. Whatever sanction the rule laid down may have received from his reasoning, it is safe to say was greater than resulted from his citation of authority. The only cases which the learned justice presented for his support were *Burlingame v. Burlingame*, *King v. Brown*, and *Hopkins v. Lee*.^(r') An examination of the first two will show them to be authority against the position which they were cited to sustain; and the last case arose under peculiar circumstances, was decided without much consideration or research, and is supported by no authority whatever.

The large damages which it was possible to recover under this ruling, and the comparative ease with which claims resting merely on parol evidence can be established against decedents' estates, gave rise to quite a number of cases which followed in the wake of *Jack v. McKee*, and were disposed of in the same manner. In the meantime, however, the complexion of the Supreme Court was

(r) *Wilson v. Clarke*, 1 W. & S. 554; (r') *Burlingame v. Burlingame*, 7 Cow Ellet v. Paxson, 2 id. 433; *Bowser v.* 94; *King v. Brown*, 2 Heisk. 489; *Hop-Cessna*, 62 Pa. St. 148; *Meason v. Kaine*, *kings v. Lee*, 6 Wheat. 109. 67 id. 131; see 1 Sm. Laws of Pa. 397, note.

changing, and the new blood took a stand against this course of decision as tending to unsettle titles, and encourage fraud and perjury. In *Malaun v. Ammon*, Mr. Justice Woodward, expressing the sentiments of his brother Lowrie, as well as of himself, delivered a dissenting opinion which attacked quite fiercely the ruling of the court as laid down by Mr. Justice Rogers in *Jack v. McKee*, and as followed by a bare majority of the court in the principal case. This opinion, which contained a careful review of the cases, was subsequently adopted by a unanimous court in *Hertzog v. Hertzog*, and has not since been questioned; so that it may be laid down with confidence that in Pennsylvania the measure of damages is the value of the work done or services rendered, and not the value of the land promised as a reward.^(s)

§ 762. In *Ellet v. Paxson*, Mr. Justice Kennedy let fall the dictum that the plaintiffs at most were only entitled to recover damages equal to the loss actually sustained by a non-fulfillment of the contract. It might also be inferred from the decision in *Sedam v. Shaffer* that loss of the bargain forms an element of damage in this State. But that such is not the case, except where there is fraud, is well settled by a long list of later cases. In *Ewing v. Thompson*, Mr. Justice Read laid down the rule thus: "The measure of damages is the actual consideration passing between the parties. If the consideration were services rendered, they are to be compensated according to their value—if monies received, they are to be returned with interest. But the value of the bargain is not the measure."^(t) This rule as to the value of the bargain only holds good where the vendor acts with good faith; where he is guilty of collusion, tort, artifice, and fraud, to escape from the effects of a bad bargain, it is otherwise. In that case the vendee is entitled not only to compensatory damages, but to damages arising from the loss of the bargain, or the money he might have derived from the completion of the contract. This was the decision of the court in *Bitner v. Brough*, and it has always been the rule

(s) *Hertzog v. Hertzog*, 34 Pa. St. 418, overruling *Jack v. McKee*, 9 id. 235; *Bash v. Bash*, Id. 260; *McDowell v. Oyer*, 21 id. 417; *Malaun v. Ammon*, 1 Grant, 123; *Beach v. McClintock* (not reported).

(t) *Ellet v. Paxson*, 2 W. & S. 433;

Sedam v. Shaffer, 5 W. & S. 521. And sustaining the point made in the text, *Ewing v. Thompson*, 66 Pa. St. 384, and cases cited; also *Bender v. Bender*, 37 id. 419; *Harris v. Harris*, 70 id. 174; *Bowser v. Cessna*, 62 id. 148.

in this State. Such damages are not consequential in the sense in which consequential damages are sometimes said to be too remote. They are in the immediate contemplation of the parties when the contract is made, and the only damages allowed are those that would be made *immediately* out of the contract. Vindictive damages for violation of faith are not allowed in any action for breach of contract, with perhaps the single exception of breach of promise of marriage.^(u)

§ 763. The only remaining question for us to decide is, what constitutes such fraud as will entitle the plaintiff to compensation for the loss of his bargain. In the earlier cases on the subject, and indeed in some very recent ones, the suggestion is made with more or less distinctness that mere failure to convey, where it is in the vendor's power so to do, is a fraud, and that on the strength of it the loss of the bargain could be recovered. These cases, however, do not decide the point directly, and the court in stating the general rule has not thought it necessary to go into detail, or to sift the exceptions. Whatever weight may be accorded to these *dicta* is entirely overborne by the firm stand taken by the Supreme Court in some very recent cases, where the subject is carefully examined, and the reason for the rule as well as the rule itself is distinctly stated. Chief Justice Thompson, in *Harris v. Harris*, speaks in strong terms: "The only exception to the rule is where there has been fraud on the part of the vendor *in the original contract*. But the failure to convey is not such fraud. Buyer and seller both know that such a contract could not be enforced, and it was no more a fraud to refuse performance by conveying than any other breach of a contract to perform an act." Still later we have two opinions by Mr. Justice Gordon to the same effect. In *Sausser v. Steinmetz* the words used are very similar to the ones last quoted, the subject being dismissed with the remark that neither party could plead ignorance of the statute, and hence both are presumed to have known that either might take advantage of its terms; and that the defendants did avail themselves of that privilege cannot be regarded as a fraud on the plaintiff.^(v)

What constitutes such fraud as will allow plaintiff to recover for loss of bargain.

(u) *Ritner v. Brough*, 11 Pa. St. 139; 35 id. 28; and for a full discussion of this subject see 16 Am. Law Reg. N. S. *Hoy v. Grenoble*, 34 id. 10; *Dumars v. Miller*, 34 id. 323; *McCloury v. Croghan*, 31 id. 22; *McNair v. Compton*, 585.

(v) The earlier cases on this subject

§ 764. There is one case in which loss of the bargain is included in the damages, where the only circumstance that could be called fraudulent is refusal to perform the contract. It is the case of failure to comply with a bid at public sale. The reason of this probably is that as the bid is made in open market, and is only an inconsiderable amount greater than was offered by other bidders at the same time, the damages caused are direct and real, and in no way can be called consequential and remote. The failure of the vendee to perform his contract causes a direct loss to the vendor, who is thereby put to the expense of another sale, and if the price brought at this sale is less than was bid by the former vendee, the latter ought in common justice to make good the deficit as well as bear the expenses of the resale. Another consideration which has tended to the establishing of this exception is the protection always extended by the courts to public sales. Being open and public there is less room for secret fraud; and, in this instance, the courts seem to protect them from breach of faith, and to compel the bidder to live up to an agreement which was made openly and notoriously, and as it were to the court itself. The point is well supported by authority. In *Ashcom v. Smith*, Chief Justice Gibson, speaking of failure to comply with a bid at an auction, states clearly that where the vendor has acted *bona fide* and with reasonable care, the measure of damages is the difference of price on a resale. Mr. Justice Sharswood affirmed this decision in *Bowser v. Cessna*, saying that it is the universal rule as regards sales of chattels, and the Statute of Frauds being out of the way, there is no reason why the harmony of the system should not be preserved by resorting to it also in cases of realty.^(w)

were *Bohr v. Kindt*, 3 W. & S. 563; *Domenec*, 2 W. N. C. 196; *Sausser v. Bitner v. Brough*, 11 Pa. St. 139; *Mc-Steinmetz*, 8 W. N. C. 101; 88 Pa. St. *Cloury v. Croghan*, 31 id. 22; *Hoy v. 324. See chapter XXI.*
Gronoble, 34 id. 11; *Bowser v. Cessna*, 62 id. 149; *Meason v. Kaine*, 67 id. 131. (w) *Ashcom v. Smith*, 2 P. & W. 219; *Bowser v. Cessna*, 62 Pa. St. 150, and These have been superseded by *Harris v. Harris*, 70 Pa. St. 174; *Ruckert v.* authorities cited.

CHAPTER XXXIV.

SURRENDER.

- § 765. By the third section of the statute the assignment or surrender of an interest in land must be by writing signed, &c.
- § 766. The corresponding sections of the American statutes compared.
- § 767. Surrender before the Statute of Frauds.
- § 768. Operative words of surrender.
- § 769. Assignment or surrender need not be under seal.
- § 770. Surrender to operate *in futuro*; invalid by weight of the English cases.
- § 771. The American cases contra.
- § 772. Surrender by "act and operation of law." Meaning of the phrase.
- § 773. How far a surrender by operation of law depends upon the intention of the parties.
- § 774. Parties to a surrender. Acceptance necessary.
- § 775. Assignment or surrender by agent.
- § 776. English rule that short leases created without writing under second section must be assigned or surrendered by writing. *Botting v. Martin*.
- § 777. Oral assignment of entire term held good as a lease. *Preece v. Corrie*. Later cases contra.
- § 778. American rule that a lease orally made may be orally assigned or surrendered.
- § 779. Oral assignment and waiver of equitable estate. Easements, &c.
- § 780. Written instruments interpreted as surrenders.
- § 781. Actual performance of invalid agreement.
- § 782. Cancellation, &c., of lease or deed not a surrender, though evidence of it. Early cases compared.
- § 783. Destruction, &c., of an unrecorded deed in the several United States. Doctrine of estoppel.
- § 784. Destruction, &c., of bond or mortgage.
- § 785. Surrender of term by accepting new lease.
- § 786. Agreement for new lease.
- § 787. Conditional surrender.
- § 788. Oral agreement for increase or reduction of rent not a surrender.
- § 789. Surrender by assent to lessor's grant to a third party. *Thomas v. Cook*; its application to freehold interests.
- § 790. Discussion of rule of *Thomas v. Cook* in United States.
- § 791. Extension of the principle. The essential acts *in pais*.
- § 792. Effect of giving up possession and notice to quit. Breach of covenant, &c.
- § 793. Acts of ownership as evidence of intent. Delivery of key. Collection of rent from another than lessee. Abandonment of premises. Option given to lessor.
- § 794. Effect of surrender on surety for rent.

§ 765. THE third section of the Statute of Frauds provides

By third section of the statute the assignment or surrender of an interest in land must be by writing, signed &c.

thereunto lawfully authorized by writing, or by act and operation of law.”(a)

§ 766. As will be seen by reference to the statutes as collected in the Appendix, this section has in general been substantially re-enacted in most of the United States. In California,(b) Dakota,(c) Iowa,(d) Kansas,(e) Kentucky,(f) Ohio,(g) Oregon,(h) and Rhode Island,(i) there does not seem to be any express provision made for *surrender* as distinguished from ordinary *transfer*, and in all these States, with the exception of Ohio, the exception in favor of short leases is limited to those not exceeding one year in length.

In some other States the language is even more general. Thus in Alabama,(j) Delaware,(k) Illinois,(l) Tennessee,(m) Texas,(n) Virginia,(o) Washington Territory,(p) West Virginia,(q) and Wyoming,(r) and some others, the statutes refer simply to *contracts* for the sale of lands, tenements, and hereditaments, or the leasing thereof for a term exceeding one year, &c.

(a) See generally *Magennis v. MacCullough*, Gilb. Eq. 236; *Lyon v. Reed*, 13 M. & W. 307; *Botting v. Martin*, 1 Camp. 319; *Doe d. Burr v. Denison*, 8 U. C. Q. B. 185; *Massey v. Hackett*, 13 La. Ann. 56; *Ogden v. Sanderson*, 3 E. D. Smith, 169; *M'Daniel v. Moorman*, Harp. Ch. 108.

(b) Civil Code, 1872, § 1091. But see Code of Civil Procedure, § 1971.

(c) Rev. Civil Code, 1877, § 622.

(d) McClain's Annotated Statutes, 1880, § 3664.

(e) Compiled Laws, 1879, § 2663.

(f) General Statutes, 1881, chap. 24, § 2.

(g) Revised Statutes, 1880, § 4198, in force February 19th, 1810.

(h) Civil Code, chap. 8, title viii. § 771, in effect June 1st, 1861.

(i) Public Statutes, 1882, title xxii. chap. 173.

(j) Revised Code, 1876, § 2121, 5.

(k) Revised Code, 1852, chap. 63, § 7.

(l) Revised Statutes, 1883, chap. 59, § 2.

(m) Compiled Laws, 1871 (act of 1801, chap. 25), 1758, 2.

(n) Revised Statutes, 1879, title xlvii. art. 2464, 4.

(o) Code 1873, chap. cxl. 1.

(p) Code 1881, chap. 172.

(q) Revised Statutes, 1879, chap. 95, § 1.

(r) Compiled Laws, 1876, chap. 57, § 1, 5.

In Ohio the prohibition is general in its terms, and in North Carolina^(s) it is provided simply that "all contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them shall be void and of no effect unless," &c. And a similar provision exists in Connecticut,^(t) Indiana,^(u) and Mississippi.^(v) In Florida on the other hand an assignment or release of a term exceeding two years must be by deed, executed in the presence of two witnesses.^(w) In Vermont a deed is required also for an assignment of lease.^(x) In the States other than those just mentioned, the English statute has been substantially re-enacted.^(y)

It may be said, nevertheless, that a parol assignment of a lease is impliedly forbidden in nearly all of these States, for, as was observed in one of them, an assignment of a term requiring a writing to create it could not in reason be verbally made, even though the statute contains no express provision relating to such assignment; for if, as is clear, the statute against parol leases applies to those which are carved out of a term as well as out of the inheritance, it cannot be that a long termor can assign his *whole* interest verbally when he could not underlet part of it without a writing. There is no difference between the creation and the assignment of a term, as the term is an interest in land.^(z) And it is believed that the same reasoning would apply to surrenders; a surrender being indeed nothing more than a re-demise.^(a) Be that as it may, the section of the statute containing this provision against the assignment, grant, or surrender by parol of interests in land, may fairly be considered to constitute a part of our American legislation, and as the rules which govern such assignment and surrender are closely analogous (especially in regard to those resulting from operation of law), they will be considered, so far as practicable, together.

§ 767. A surrender is the yielding up of an estate for life or

(s) Battle's Revisal, 1873, chap. 50, § 10.

(t) Revised Stat. 1875, title 18, chap. 6, § 5.

(u) Revised Stat. 1881, chap. 65, §§ 4904, 4925.

(v) Revised Code 1880, § 2892.

(w) McClellan's Digest, 1881, chap. 32, § 1.

(x) Rev. Stat. 1880, § 1934.

(y) Compare Statutes in Appendix.

(z) Briles v. Pace, 13 Ired. (Law) 279.

In Kentucky a parol surrender is good, the third section of the statute not having been adopted in that State; McKenzie v. Lexington, 4 Dana, 131.

(a) Strong v. Crosby, 21 Conn. 398; Gwyn v. Wellborn, 1 Dev. & Bat. (Law) 313; Allen v. Jaquish, 21 Wend. 635; and see Loyd v. Langford, 2 Mod. 175.

Surrender
before the
Statute of
Frauds.

years to him who has the immediate reversion or remainder ;(b) and before the Statute of Frauds a lease created either by deed or parol, might have been surrendered by parol or writing not under seal.(c) So a junior patentee, while a right of entry exists in an older patentee, can surrender to him in possession without writing.(d) And so indeed of any estate, except where the subject thereof was such as could not pass without deed, as incorporeal hereditaments which lay in grant, such as rents, or advowsons(e) or a reversion of a term of years.(f)

§ 768. Release and discharge are the strong operative words of a surrender, but they are not essential. Any writing showing an intention to surrender the term, is a sufficient compliance with the statute. The term "re-convey" has been held exact enough.(g) And the words "release and discharge the term of 500 years" have been held to be much stronger than others which have been sustained *ut res magis valeat*.(h)

In Doe d. Wyatt v. Stagg(i) the words "renounce and disclaim, and also surrender and yield up to the lessor," were interpreted as a surrender, and not as a disclaimer.(j)

§ 769. By the terms of the statute the surrender or assignment must be by deed or note in writing; and it has accordingly been held almost without exception both in England and in the United States that either a sealed or an unsealed writing is a sufficient compliance with the statute.(k) Nor does the fact that the estate had been created by deed render it necessary for the surrender or assignment

(b) Co. Litt. 337 b.
(c) Bennett v. Westbeck, Poph. 137;
Farmer v. Rogers, 2 Wils. 26; Doe d.
Gwyn v. Wellborn, 1 Dev. & Bat. 313;
Lyon v. Reed, 13 M. & W. 235; Schief-
felin v. Carpenter, 15 Wend. 400.
(d) Smith v. Morrow, 5 Litt. 213.
(e) Nelson v. Woodward, Cro. Eliz.
249. And see Perkins v. Perkins, id.
269; Roberts on Frauds, *247.
(f) Beeley v. Parry, 3 Lev. 154, 36
Chas. II.
(g) Shepard v. Spaulding, 4 Metc.

Mass. 417; Challoner v. Davis, 1 Ld.
Ray. 402, citing 40 Ass. 16.

(h) Farmer v. Rogers, 2 Wils. 26; Co.
Litt. 338 a.

(i) 5 Bing. N. C. 564; 7 Scott, 690.

(j) In Arms v. Burt, 1 Vt. 303, a
lease was endorsed with a writing not
under seal, by which the parties thereto
"do hereby release, discharge, and ex-
onerate each other therefrom." It was
held not to operate as a surrender, or
discharge of title.

(k) Holliday v. Marshall, 7 Johns.

to be likewise under seal,^(l) though the assignee by parol of a lease under seal may be compelled in an action upon the lease to sue as the equitable plaintiff.^(m) In the last case the question was thoroughly considered; and the court, having cited the earlier cases in Massachusetts,⁽ⁿ⁾ admitted that the rule requiring the assignment to be by deed was correct as applied to the assignment of the *instrument* itself as a contract. "But a lease," said Wells, J., "by whatever form of instrument it is made, conveys to the lessee an interest in the land. He may in turn convey to another any subordinate interest, or his entire interest in any appropriate form, without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise by sale on execution as a chattel, or sale by an administrator as personal assets."^(o)

At first, however, there seems to have been some confusion upon this point. Thus in the case of *Birch v. Bellamy*,^(p) it was said *per curiam*: "A tenant for years now cannot assign over his term without *writing*, but the assignment may be pleaded without saying it was by deed;" while the syllabus of the reporter reads: "A term cannot now be assigned without *deed*, but need not be said so in pleading, but to come in evidence."^(q) But so far as the English decisions subsequent to 1845 are concerned, it must not be forgotten that by the Stat. 8 & 9 Vict. c. 106, all surrenders and assignments must be by *deed*. This statute has not been adopted in any American State, but has been followed in Upper Canada and Ireland.^(r)

§ 770. The weight of the English authorities seems to be that a surrender cannot operate *in futuro*. In *Johnstone v. Surrender to Huddleston* (1825),^(s) a tenant from year to year gave *operate in*

211; *Beck v. Philipps*, 5 Burr. 2827; *Parmenter v. Webber*, 8 Taunt. 593; compare *Porter v. Scobie*, 5 B. Mon. 389, a case of a surrender of his interest by a mortgagee.

(l) *Troxell v. Wheatley*, 2 Luz. Leg. Reg. 37; *Roe v. Conway*, 74 N. Y. 202.

(m) *Bridgham v. Tileston*, 5 Allen, 371; though see *Sanders v. Partridge*, 108 Mass. 556.

(n) *Wood v. Partridge*, 11 Mass. 488; *Brewer v. Dyer*, 7 Cush. 337; *Bridgham v. Tileston*, 5 Allen, 371.

(o) It has been held that in case of

an assignment of a lease by a *corporation*, a note in writing, signed by the agent authorized thereto according to law, is sufficient under the statute; *Sandford v. Tremlett*, 42 Mo. 384.

(p) 12 Mod. 540, 13 Wm. III.

(q) See 12 Mod. criticized in *Wallace's Reporters*, 4th edition, page 389; and for a similar obscurity the marginal query in *Beely v. Parry*, 3 Lev. 154.

(r) See the Statutes in Appendix and *Carter v. Hibblethwaite*, 5 U. C. C. P. 475.

(s) 4 B. & C. 922; 8 C. in Exch.

futuro; invalid by weight of English cases.

less than six months' oral notice that he would quit, and the landlord assented to the notice: said Bayley, J., "Assuming that the assent by the landlord to such a notice may make it operate as a surrender of the tenant's interest, upon which I give no opinion, it must operate as an actual surrender by reason of the agreement of the parties and not as a surrender by operation of law," and was therefore invalid for want of a writing. In a later case in the Common Pleas, a tenant from year to year gave a written notice to quit not expiring with the year; and Parke, J., at *nisi prius* charged the jury in an action for trespass for taking away goods under a distress, that the landlord might, if he had chosen, have treated this irregular notice to quit as a surrender; as a term of this kind may be surrendered by a note in writing, but that he had not done so. The case, however, was decided upon another point, viz., the illegality of the distress.(t)

In the same year in which the last cited case was decided, Mr. Justice Parke took his seat as a Baron of the Exchequer, and two years later, when *Weddall v. Capes* (1836)(u) came before him, was evidently of opinion that a surrender could not operate *in futuro*, though again the opinion was extrajudicial. The question again arose, however, in 1838.(w) Baron Parke adhered to his opinion in *Weddall v. Capes*,(x) his ground seeming to be that a surrender must be made to him who has the larger or higher estate in remainder or reversion, whereas it would be impossible to state beforehand who would be such reversioner at the time the surrender by its terms was to take effect. In *Nickells v. Atherstone* (1847),(y) it was not considered necessary to consider the question, the decision turning on another point; though the court seemed to be still of the same opinion. In the later case, however, of *Foquet v. Moore*(z) the tendency seemed the other way, though this case was not cited nor the question discussed.(a)

sub nom. Doe d. Huddleston v. Johnston, McClel. & Y. 141; S. C. in K. B., *sub nom.* Johnston v. Huddleston, 7 D. & R. 411.

(t) *Aldenburgh v. Peaple*, 6 C. & P. 112.

(u) 1 M. & W. 500, S. C. 1 Gale, 432.

(w) Doe d. Murrell v. Milward, 3 M. & W. 332.

(x) 1 M. & W. 50.

(y) 10 Q. B. 950.

(z) 7 Exch. 870.

(a) See *Williams v. Sawyer*, 3 Brod. & Bing. 770, where, however, the surrender was to operate immediately; and *Badeley v. Vigurs*, 4 E. & B. 71.

§ 771. The question, it seems, has been determined in England more upon authority than principle; and it is fair to presume that none of our courts would consider themselves bound by the precedents we have quoted. American cases contra.

In New York the contrary has been several times held; and it has been determined that under the Revised Statutes of that State a contract to surrender *in futuro* an unexpired portion of a lease is good by parol, if that portion, of course, be no more than one year.^(b) A surrender in fact is but the re-demise of the term granted, and if that term might originally be granted to begin *in futuro*, it is hard to see why a surrender might not be made in like manner.^(c)

It is apparently in harmony with the spirit of these rather than the above English decisions, that a surrender made under certain conditions is held not to operate until the conditions are fulfilled; ^(d) and so, if a surrender is intended for a particular purpose and that purpose, the only motive of it, fails, the surrender ought to fail too.^(e)

§ 772. By this section of the statute a surrender may not only be effected by "deed or note in writing," but also "by act and operation of law;" a provision very similar to the exception contained in section eight in favor of implied and constructive trusts.^(f) "There is *prima facie* a good deal of doubt," it was said in *Dodd v. Acklom*,^(g) "about the meaning of the term *act and operation of law*, as used in the Statute of Frauds. Probably the expression referred to such surrenders as were then known and which are mentioned in *Plowden*," *e. g.*, taking a new lease by lessee during the continuance of the

Surrender by "act and operation of law;" meaning of phrase.

(b) *Allen v. Devlin*, 6 Bosw. 6, affirmed *sub nom.* *Smith v. Devlin*, 23 N. Y. 363.

(c) *Allen v. Jaquish*, 21 Wend. 635, where, however, the English cases were not cited; *Young v. Dake*, 1 Seld. 463.

(d) *Coupland v. Maynard*, 12 East, 134.

(e) *Wilson v. Sewell*, 4 Burr. 1980, to same effect as *Davison d. Bromley v. Stanley*, 4 Burr. 2210, cited in *Coupland v. Maynard*, *supra*; Year Book 7 E. IV., cited in *Wilston v. Pilkney*, 1

Vent. 242, in which case a lease having been made to him in reversion, thus effecting a surrender by operation of law, it was said that there was no reason why a rent could not be created upon it as well as a condition; *S. P. Cartwright v. Pinkney*, 1 Vent. 272 (25 Car. II.)

(f) See generally *Phené v. Popplewell*, 12 C. B. N. S. 339; *Thomas v. Cook*, 2 B. & Ald. 119; *Doe d. Burr v. Denison*, 8 U. C. Q. B. 185; *Dodd v. Acklom*, 6 M. & G. 679.

(g) 6 M. & G. 679.

old one, and thereby affirming that the lessor had power to make such lease.^(h) On the other hand, in an Irish case,⁽ⁱ⁾ Brady, C. B., after defining a surrender by operation of law as the "construction put by the courts on the acts of the parties in order to give those acts the effect substantially intended by them," went on to say: "Surrender by *implication* of law is quite a different thing; thus, before the Statute of Frauds the mere canceling the deed may have amounted to a surrender by implication."

But whatever difference there may be between the two expressions theoretically, the authorities are nearly unanimous as to the practical definition to be given to the language of the statute. Thus in an important English case,^(j) Erle, C. J., stated the law to be that anything which amounts to an agreement on the part of the tenant to abandon and on the part of the landlord to resume possession of the premises, amounts to a surrender by operation of law,^(k) which is broader and probably more accurate than the language of Parke, B., restricting the term to cases where the owner of a particular estate had been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid, if his particular estate continued to exist.^(l)

A surrender, therefore, may be consummated by any words or acts on the part of the lessee fairly importing such intention, "provided that it be accepted by the landlord as such;"^(m) but with the general caution to be observed in all such cases of implied surrender that the acts *in pais* must be unequivocal; they must be such as are not easily referable to a different motive.⁽ⁿ⁾ Circumstances, however, such as lapse of time, change of residence,

(h) Plowden, 106, 107, is cited, but the case seems to have been one of a surrender by act of the parties and not by operation of law.

(i) Lynch v. Lynch, 6 Ir. L. R. 138.

(j) Phené v. Popplewell, 12 C. B. N. S. 339.

(k) This definition has been adopted in a late decision in Massachusetts, Hanham v. Spencer, 114 Mass. 19; Amory v. Kannoffsky, 117 Mass. 351.

(l) Lyon v. Reed, 13 M. & W. 285.

(m) Strong v. Crosby, 21 Conn. 392;

Martin v. Kepner, 1 West. L. J. 396; Livermore v. Eddy, 33 Mo. 547; McKinney v. Reader, 7 Watts, 123; Baker v. Pratt, 15 Ill. 568; Martin v. Stearns, 52 Ia. 345; Furnivall v. Grove, 8 C. B. N. S. 512; Camarillo v. Fenlon, 49 Cal. 202. And compare Rex v. Inhabitants of Ecclesal Bierlow, Burr. S. C. 562; Rex v. Inhabitants of Weddington, Id. 766; and Rex v. Warden, 2 M. & R. 24. See *post*, § 774.

(n) Kerr v. Simmons, 8 Mo. App. 431; Martin v. Stearns, 52 Iowa, 345;

or acquiescence of the parties, might be sufficient to raise such a presumption;(o) just as a surrender of a trust or the conveyance of the legal estate may be presumed from lapse of time, after the object of the trust has been effected.(p)

So it has been held, in replevin upon a distress for rent, that where the plaintiff took the lease in his own name under an agreement with the defendant to act for him, and that the defendant should then sublet to the plaintiff, that no written assignment was necessary under the Statute of Frauds, since it appeared that the plaintiff took the premises in the first instance only as a trustee for the defendant.(q)

§ 773. Moreover, the rule being drawn simply from the presumed intention of the parties, a surrender will not be implied when it is obvious that those acts were intended to confer a further benefit upon the lessee, and not to take away any of his former rights under the lease.(r) So, in Vermont,(s) a right of easement established by adverse user was held not done away with by an application made by the claimant of the easement to the owner of the servient property for a license to use the way. The intention of the parties will, however, prevail only to a certain extent, for, as was said in *Lyon v. Reed*, *supra*, such surrender is the act of the law, and takes place sometimes independently of and even in spite of such intention; and in the same case it was said that the acts *in pais* to bind by way of estoppel must be as formal and solemn as the execution of a deed, for example, livery, entry, or the acceptance of an estate.(t)

How far a surrender by operation of law depends upon the intention of the parties.

As the most frequent example is stated, a surrender of a lease in possession is implied in the acceptance of a new lease; for if the lessee accept a new lease from his lessor, he admits and affirms his lessor's ability to make such new lease, which could not be done

Griffith v. Hodges, 1 C. & P. 419;
Brewer v. Dyer, 7 Cush. 337.

(o) *Doe d. Courtail v. Thomas*, 9 B. & C. 296.

(p) *England v. Slade*, 4 T. R. 682;

Brown v. Combs, 5 Dutch. 39; *Armstrong v. Peirse*, 3 Burr. 1900-1; *Lades v. Halford*, Buller, N. P. 110.

(q) *Clark v. Waterlow*, 8 C. & P. 365; compare *Atkins v. Rowe*, Mosley, 39.

(r) *Thomas v. Zumbalen*, 43 Mo. 471; *Van Rensselaer v. Penniman*, 6 Wend. 569.

(s) *Tracy v. Atherton*, 36 Vt. 520.

(t) *Lyon v. Reed*, 13 M. & W. 285; *Mayhew v. Hardesty*, 8 Md. 495.

by him if the old lease stood in the way.(u) And after the new lease has been accepted, both lessor and lessee are estopped from setting up the old one.(v) But such is by no means the only instance of a surrender by operation of law, which will take place whenever, to use the oft-quoted phrase, a statute meant to prevent fraud would be turned into an instrument to effect it. Where, for example, in case of a lease under seal, the key was delivered up by the tenant and accepted by the landlord who put another tenant in possession, it was held that these facts constituted a surrender of the lease.(w)

§ 774. We have next to notice who must be the parties to a valid surrender. The note in writing, it is said, must be signed by the party so assigning or surrendering, or their agents thereunto duly authorized by writing, and, as is usually said, such surrender must be duly accepted by the other party.(x) To adopt a distinction sometimes taken, it would be more correct to say that the surrender must not be disagreed to. The acceptance of the surrender by the surrenderee is not, according to this view, an ingredient of the surrender itself; which, if valid at all, is necessarily complete antecedently to any agreement or acquiescence on the part of the surrenderee, the effect of whose acceptance would be merely to deprive him of the power of subsequently *disagreeing* to the surrender, and of thereby rendering void *ab initio* that which, until disagreed to, had created a complete though defeasible merger of the estate of the surrenderor.(y) The surrender, therefore, must take place between

(u) Roberts on Frauds, *254.

(v) Dodd v. Acklom, 6 M. & G. 679. See post, § 785.

(w) Randall v. Rich, 11 Mass. 494; Hesseltine v. Seavery, 16 Me. 212; Bailey v. Wills, 8 Wis. 141. And see post, §§ 789 et seq.

(x) See *supra*, § 772.

(y) Note by the reporter to Cannan v. Hartley, 9 C. B. 635; 67 E. C. L. page 647; and also note to S. C. *635. "Without any assent, either express or implied, on the part of the surrenderee, the estate vests in him by the mere act of the surrender or until actual dissent.

See Thompson v. Leach, 2 Salk. 618; 3 Lev. 284; Holt, 665; Carth. 211, 250; 2 Mod. 290; 1 Show. 296; Freeman, 502; 2 Ventr. 198. In that case it had at first been held in the C. P. contrary to the opinion of Ventris, J., that assent on the part of the surrenderee was necessary for the purpose of vesting the interest in him. And in Townson v. Tickell, 3 B. & Ald. 31, the Court of K. B., not being aware that the judgment in Thompson v. Leach had been reversed, acted upon the authority of the original overruled decision. *Vide* 4 M. & R. 189 n.;" see Thompson v. Leach,

the landlord and tenant acting in their own right.^(z) To instance an example: in *Matthews v. Sawell*^(a) the owner of land subject to a lease agreed to sell, and the intending purchaser bought from the lessee the residuum of the term and put a new tenant in possession, but without the consent of the lessor. The contract of sale being rescinded, it was held that there had been no valid surrender, and, therefore, the lessee continued liable to the end of his term. In a New Hampshire case^(b) a lease was made by two to a third person for life, who subsequently conveyed his interest to one of his lessors, reserving a rent. It was held that the conveyance, not having been made to both lessors, did not operate as a surrender; and, if it had been to both, it would have been conditional merely. So a parol agreement between landlord and tenant for a new lease for a longer term, to a third party, is not without more a valid surrender.^(c) The cases in which a letting to a new tenant, who has been put into possession, has been held to operate as a surrender of the term, proceed upon the assent of all the parties.^(d) Though if the new tenant take possession with the assent of either the landlord or the tenant, it will, as against the one consenting, operate as a surrender.

§ 775. Questions often arise as to the interpretation of the phrase "agent thereunto lawfully authorized by writing." Thus in *Wheeldon v. Milligan*,^(e) the surrender was made by the wife of the lessor, who had absconded. His letter to her contained these instructions: "Tell Mr. M. (the lessor) not to be afraid of me. I will see him all right. * * If Mr. M. will do the thing that is square, that is all right; but I hope he will be a friend to you, and I will do the same to him. As regards Mr. M.'s affairs, I wish you to do the best you can." It was held, Hagarty, C. J., dissenting, that the letter constituted the wife her husband's agent to surrender the premises.^(f)

commented upon in the note of the American editor to *Xenos v. Wickham*, 14 C. B. N. S. 435, Eng. Com. Law Rep. 108, p. 474; *Ogden v. Sanderson*, 3 E. D. Smith, 169.

(z) *Cadle v. Moody*, 30 L. J. N. S. Ex. 385. (c) *Schieffelin v. Carpenter*, 15 Wend. 400.

(a) 8 Taunt. 275. (d) *McDonnell v. Pope*, 9 Hare, 706;

(b) *Sperry v. Sperry*, 8 N. H. 477. *Thomas v. Cooke*, 2 B. & Ald. 119;

(c) 44 U. C. Q. B. 174. *Graham v. Wichelo*, 3 Tyr. 201; 1 C. &

(f) *Ramsay v. Stafford*, 28 U. C. C. P. 229; *Sandford v. Tremlett*, 42 Mo.

It was lately held in *Massachusetts*(*g*) that a surrender by the administrator of the lessee, who occupied the premises after the lessee's death, and its acceptance by the lessor without reservation of a right of suit, terminated all liability both of the administrator and of the estate upon the covenants of the lease, though the lessor was entitled to the rent up to the date of the surrender.(*h*) It should also be noted that cases may arise in which the surrender, though invalid as to third parties, may yet be good as between grantors and grantee.(*i*)

§ 776. Passing now to the subject-matter of the third section of the statute, it will be noticed that its language is explicit in providing that "no leases, estates, or interests, either of freehold or term of years, or any uncertain interest, * * shall be assigned, granted, or surrendered, unless it be by deed or note in writing." In view of this it has been established as a general rule that such short terms as are created without writing under the second section nevertheless require a writing for a valid assignment or surrender. *Botting v. Martin*(*j*) is generally cited as the first case in which this ground was taken, and in that case it was applied to the assignment of a tenancy from year to year. *Mollett v. Brayne*,(*k*) a case of a parol tenancy from year to year, followed *Botting v. Martin* ;(*l*) and in 1814 Sir Vicary Gibbs, then Chief Justice of the Common Pleas, said that the clause of the statute which restricts estates created by parol to three years, has nothing to do with that which requires surrenders to be in writing.(*m*) In *Thomson v. Wilson*(*n*) it was held that a tenant paying quarterly cannot by a mere parol agreement with his landlord determine the tenancy in the middle of a quarter, but that such surrender must be in writing; nor will a like agreement with a landlord to accept a third party as tenant,

English rule that "short leases" created without writing under second section must be assigned or surrendered by writing; *Botting v. Martin*.

384, a case of assignment of lease by the agent of a corporation. See in general, chapter XV.

(*g*) *Deane v. Caldwell*, 127 Mass. 242.

(*h*) See *Remnant v. Bremridge*, 8 Taunt. 192; S. C. 2 Moore, 94.

(*i*) *Barrett v. Thorndike*, 1 Greenl.

(*j*) *Botting v. Martin*, 1 Camp. 317 (1808).

(*k*) 2 Camp. 103 (1809).

(*l*) 1 Camp. 317.

(*m*) *Whitehead v. Clifford*, 5 Taunt. 518.

(*n*) 2 Stark. 334 (1818).

discharge a tenant from year to year from liability for rent for the current year.(o)

§ 777. In *Preece v. Corrie*,(p) one who held a term which expired November 11th, let the premises orally from September 11th to November 11th, the consideration or "rent" being payable immediately; it was held to be a lease and not an assignment, and therefore good by parol.

Oral assignment of entire term held good as a lease; *Preece v. Corrie*; later cases contra.

In a later case *Preece v. Corrie* was not noticed, but the court were evidently of opinion that an agreement by a lessee for the transfer of his interest in a term, being less than three years, was not only invalid as an assignment, but also that it could not operate as an under-lease.(q) Baron Parke in that case doubted the authority of *Poultney v. Holmes* contra,(r) especially since the decision in *Parmenter v. Webber*.(s)

In a subsequent case, however,(t) a parol sub-lease for a period less than a year ending contemporaneously with the original lease was held good; the court declining to regard it as an assignment, though all the lessor's interest passed; and that, too, although by the later statute of 8 & 9 Vict. c. 106(u) an assignment must be not only by writing but under seal. The court proceeded on the principle "*ut res valeat*," it being evidently the intention of the parties in that case to create the relation of landlord and tenant; thus sustaining the decision in *Preece v. Corrie*.(v) and *Baker v. Gostling*,(w) and distinguishing *Barrett v. Rolph*(x) as a case where an assignment was probably intended; and *Parmenter v. Webber*(y) and *Smith v. Mapleback*(z) as merely deciding that the lessor cannot distrain, not having any reversion, and not implying a negation of the right to sue for use and occupation.

But in the most recent case(a) it was distinctly held that an

(o) *Taylor v. Chapman*, Peake's Add. Cases, 19; *Doe v. Ridout*, 5 Taunt. 519.

(p) 5 Bing. 24; S. C. 2 M. & P. 57 (1828).

(q) *Barrett v. Rolph*, 14 M. & W. 348 (1845).

(r) 1 Stra. 405.

(s) 8 Taunt. 593; see also *Wollaston v. Hakewill*, 3 M. & G. 297.

(t) *Pollock v. Stacy*, 9 Q. B. 1033; 11 Jur. 267; 16 L. J. Q. B. 135.

(u) See Appendix.

(v) 5 Bing. 24.

(w) 1 Bing. N. C. 19, 4 M. & Scott, 539.

(x) 14 M. & W. 348.

(y) 8 Taunt. 593.

(z) 1 T. R. 441.

(a) *Beardman v. Wilson*, L. R. 4 C. P. 57.

under-lease of the whole term amounts to an assignment. *Parmenter v. Webber*(b) was followed, and *Pollock v. Stacy*(c) was seriously doubted. In Ireland the courts had, after some fluctuation, adopted the view taken in *Barrett v. Rolph*;(d) and the Queen's Bench held that the relation of landlord and tenant could not be created between assignor and assignee upon a conveyance of the entire residue of a term by which no reversion was left in the assignor.(e) The Exchequer at first held the contrary opinion,(f) but afterwards adopted the doctrine held in the Queen's Bench.(g)

On the whole, therefore, it may be said that the better opinion in England (and in this country as well) is that the conveyance of the entire residue of a term cannot operate as an under-lease. The cases which held the contrary will be found, it is believed, to be those where, under the peculiar facts, the intention has been very plainly to create the relation of landlord and tenant between the assignor and the assignee, evidenced by the reservation of a power of re-entry or of distress, &c.(h)

§ 778. A different and it is conceived a more reasonable view of the relation of the prohibition of the third section to the exception contained in the second, is taken in some of our American States. In 1838(i) it was held by Gibson, C. J., that a lease for three years, whether written or not, may be surrendered or assigned by parol. "That the section," said he, "was intended for the surrender or transfer of a lease in which writing was a necessary ingredient, is evident from the fact that there is no purpose which requires writing in a surrender or transfer which does not equally require it in the act of constitution." The language of his opinion went further than the facts of the case re-

American rule that a lease orally made may be orally assigned or surrendered.

(b) 8 Taunt. 593.

(c) 9 Q. B. 1033.

(d) 14 M. & W. 348.

(e) *Pluck v. Diggee*, 5 Bligh, N. S. 41.

(f) *Lessee of Walsh v. Feely*, 1 Jones, Ir. 413.

(g) *Lessee of Porter v. French*, 9 Ir. L. R. 514; see *In re Turner's Estate*, 11 Ir. Ch. Rep. 304.

(h) Compare *Woodhull v. Rosenthal*,

61 N. Y. 382; *Ganson v. Tift*, 71 N. Y. 48; *Collins v. Hasbrouck*, 56 N. Y. 157; *Williams v. Hayward*, 1 E. & E. 1040; *Adams v. Beach*, 1 Phila. 99; *Lloyd v. Cozens*, 2 Ashmead, 131; *McAdam, Landlord and Tenant*, § 130; *Taylor, Landlord and Tenant*, § 16, note. A question similar to that in *Barrett v. Rolph* is discussed in 1 Cent. Law Journal, 482, 511, 533.

(i) *McKinney v. Reader*, 7 Watts, 123.

quired, but upon it were based the subsequent decisions of Greider's Appeal^(j) and *Kiester v. Miller*.^(k) In some other States, too, the courts appear to lean against the English doctrine. Thus in Illinois^(l) *McKinney v. Reader* was cited with approval, the English cases not being noted, although the facts of the case did not call for a full application of Judge Gibson's opinion.^(m)

In Indiana also it has been held that a tenancy from year to year may be assigned or surrendered by parol.⁽ⁿ⁾ "His tenancy," it was said in that case, "was from year to year, and existed only in parol; and if valid in the lessee it would be strange if he could not transfer it in the same manner."^(o) And this rule prevails in New Jersey even in the case of a sealed lease.^(p) In Delaware an agreement to accept a surrender of a parol lease for one year must be in writing, although there is no statutory provision corresponding to the third section of the British statute; the court holding a surrender to be included in the terms "any contract or sale of lands, &c., or any interest in or concerning them."^(q)

§ 779. In Pennsylvania an equitable estate cannot be transferred without writing, although prior to the act of May, 1856, it could be created by parol;^(r) but an equitable estate may be waived by parol, so as to put it out of the power of the holder to obtain the interposition of a chancellor in his behalf; and in like manner it may be released.^(s) The parol rescission must be evidenced by acts which

Oral assignment and waiver of equitable estate, easements, &c.

(j) 5 Barr, 422.

(k) 25 Pa. St. 481; see also *Tate v. Reynolds*, 8 W. & S. 91; *Troxell v. Wheatley*, 2 Luz. Leg. Reg. 37; *Shoofstall v. Adams*, 2 Grant, 209.

(l) *Baker v. Pratt*, 15 Ill. 568.

(m) But see *Swanzy v. Moore*, 22 Ill. 65; and *Bliss v. Gardner*, 2 Bradw. 423, where a parol assignment of a term greater than a year was held good when executed and accepted. So also in *Webster v. Nichols*, 104 Ill. 160.

(n) *Ross v. Schneider*, 30 Indiana, 423.

(o) Citing *Peters v. Barnes*, 16 Ind. 219.

(p) *Mairs v. Sparks*, 2 South. N. J. 513.

(q) *Logan v. Barr*, 4 Harr. 546. For Connecticut rule see *Strong v. Crosby*, 21 Conn. 398. For New York see *Allen v. Jaquish*, 21 Wend. 628; *Dearborn v. Cross*, 7 Cow. 48; *Rowan v. Lytle*, 11 Wend. 616; *Smith v. Devlin*, 23 N. Y. 364, 6 Bosw. 1; *Young v. Dake*, 1 Seld. 463; and see also *McKenzie v. Lexington*, 4 Dana, 129.

(r) *Murphy v. Hubert*, 7 Pa. St. 423; see *Briles v. Pace*, 13 Ind. 279, and *Holliday v. Marshall*, 7 Johns. 211.

(s) *Kline's Appeal*, 39 Pa. St. 468; *Boyce v. McCulloch*, 3 W. & S. 429; *Dayton v. Newman*, 19 Pa. St. 194; *Shoofstall v. Adams*, 2 Grant, 209; *Bowser v. Cravener*, 56 Pa. St. 132; *Renshaw v. Gans*, 7 Pa. St. 118; *Goucher v.*

leave no doubt of the intent, such as canceling the agreement or removing from the possession when the contract rests wholly in parol.(t) In Michigan an agreement to release an equitable estate *in fee*, must be in writing signed by the party so releasing it.(u)

A parol agreement concerning lands, it has often been held, may be discharged by parol. The parol evidence in such cases is good only as a defence to a bill for a specific performance, and is inadmissible as a ground to compel a performance in specie.(v) In a New York case(w) a written contract to purchase land contained a stipulation that if the buyer should fail in any of his promises, the seller could declare the contract at an end and retain all part payments. The buyer having made default, the instrument was delivered up, the signatures erased, and "canceled" written across the face of it. This was held good as a surrender. The interest of the purchaser under the contract, was only an equity, and not within the statute relating to the surrender of *estates*.(x) The declarations of a plaintiff in ejectment are not admissible to show that he had abandoned his title acquired under his deed.(y)

It is likewise held that an easement or servitude upon land is within the statute, and therefore cannot be extinguished or renounced by a parol agreement between the owners of the dominant and servient tenements,(z) and that, too, whether originally created by grant, or held by prescription, which presupposes a grant.(a)

Martin, 9 Watts, 106; Espy v. Anderson, 14 Pa. St. 308; Cravener v. Bowser, 4 Pa. St. 259; Lauer v. Lee, 42 Pa. St. 171; Lefevre v. Lefevre, 4 S. & R. 241; Garver v. McNulty, 39 Pa. St. 473.

(t) Lauer v. Lee, 42 Pa. St. 171; Adams v. Fullam, 43 Vt. 592; in this case possession had been held for thirteen years under a verbal contract of sale.

(u) McEwan v. Ortman, 34 Mich. 325; see McDaniel v. Moorman, 1 Harp. Ch. 108; Massey v. Hackett, 12 La. Ann. 54.

(v) Price v. Dyer, 17 Ves. 363; Stevens v. Cooper, 1 Johns. Ch. 429; Goman v. Salisbury, 1 Vernon, 240; Bell v. Howard, 9 Mod. 302; Carr v. Williams, 17 Kan. 582.

(w) Hart v. Britton, 17 N. Y. Wk. Dig. 552, N. Y. Supreme Court.

(x) The contract was in addition annulled in accordance with its own provisions; see De Lancey v. Ganong or Ga Nun, 5 Seld. 27.

(y) Paull v. Mackey, 3 Watts, 125; compare Jackson d. Swartwout v. Cole, 4 Cow. 587; Jackson v. Vosburgh, 7 Johns. 186; Jackson v. Kisselback, 10 Johns. 336.

(z) Erle v. Brown, 69 Pa. St. 218; Dyer v. Sandford, 9 Metc. 395.

(a) Pue v. Pue, 4 Md. Ch. 390. Though a parol agreement partially performed may operate by way of equitable estoppel as an extinguishment; Pope v. O'Hara, 48 N. Y. 452.

So if a new way be substituted by parol for an old way, the evidence of abandonment is not sufficient unless there be a deed or other evidence from which the jury can presume the release of the right of way.(b)

When the title of a disseisor has so long continued as to take away the right of re-entry, and bar an action to recover the land, it cannot be divested by a parol relinquishment.(c) Moreover, it seems quite clear that a partial surrender is valid, *i. e.*, that a party may surrender his interest in one portion of the land immediately, and the rest on a subsequent date.(d) Or a surrender may be made upon certain conditions, in which case it will not operate until the conditions are fulfilled.(e) It seems, also, that a devise of an estate can be waived by parol by the devisee, but the disclaimer must be clear and unequivocal.(f)

§ 780. We have already noticed that no especial form of words is required either by the common law or by the statute to effect a surrender, which it is said is favored in the law ;(g) and therefore any writing signed by the surrenderor, and accepted by the surrenderee, or at least not dissented from by him, will be valid as a surrender, provided, of course, that the intent is plainly manifested.(h) Questions often arise, however, as to the legal effect of the note in writing. In *Hamerton v. Stead*,(i) it was held that where a tenant together with a third person entered into a written agreement with the landlord that the latter shall give a new lease to the tenant and the third person jointly, and the two latter entered into possession, though no lease was ever executed, the first tenancy was determined ; *Roe d. Earl of Berkeley v. Archbishop of York*(j) being distinguished on the

Written instruments interpreted as surrenders.

(b) *Lovell v. Smith*, 3 C. B. N. S. J. B. Moore, 227 ; *Smith v. Pendergast*, 125 ; *Williams, J.*, thought the case analogous to *Roe d. Earl Berkeley v. Archbishop of York*, 6 East, 101 ; see also *Reignolds v. Edwards*, Willes, 282 ; *Hamilton v. White*, 1 Seld. 9 ; compare *Stevens v. Town of Norfolk*, 42 Conn. 377.

(c) *School Dist. No. 4 v. Benson*, 31 Me. 385.

(d) *Williams v. Sawyer*, 3 Brod. & Bing. 70 ; see another report of S. C., 6

(e) *Coupland v. Maynard*, 12 East, 134.

(f) *Doe d. Smyth v. Smyth*, 6 B. & C. 112.

(g) 1 Inst. 338 a ; 2 Roll. Abr. 497 ; *Shep. Touch.* 305.

(h) *Goodright d. Nicholls v. Mark*, 4 Maule & Sel. 33 ; *Jackson d. Bain v. Pulver*, 8 Johns. 370.

(i) 5 D. & R. 206.

(j) 6 East, 86.

ground that there the occupation under the second lease took place in consequence of a mistake as to its effect.

In the latter case it was held that the recital in a second lease that it was granted in part consideration of the surrender of the prior lease of the same premises was not a writing sufficient under the Statute of Frauds, since the instrument did not purport in terms to be of itself a surrender or yielding up of the interest.^(k) But where a lessee reconveys his term to his lessor by an instrument corresponding to his lease, it will operate as a surrender.^(l)

On the other hand, in a comparatively recent case,^(m) where there was endorsed on a lease a memorandum, later in date, and signed by both lessor and lessee, providing that the lessor should not dispossess the lessee before the expiration of the full term of the lease, which provided that either party might at certain stated periods prior to the expiration of the term put an end to it; the court considered that whatever might have been the effect of the memorandum to operate as a surrender of the first lease if the intent of the parties had been plainly to make a new one, yet that there was nothing from which such an intention could be collected; but on the contrary the intention was to take away from the lessor the power of determining the first lease, which the parties had not effectually done in the first instance. A letter signed by the lessee authorizing the lessor to let the premises to any one else, is not without more, as an actual letting to a new tenant and possession taken by him, equivalent to an express surrender.⁽ⁿ⁾

§ 781. The question generally arises upon the facts necessary to create a surrender by operation of law, which may be made in many ways.

Actual performance of invalid agreement.

Actual performance of an invalid parol agreement will always be a sufficient surrender by operation of law. If an agreement is so far executed that it would be inequitable to rescind it, it will be validated, though in its inception it contravened the provisions of the statute. The theory of such cases is not that they constitute an exception to the statute, but rather that the statute has no ap-

(k) *Roe d. Earl of Berkeley v. Archbishop of York*, 6 East, 86. These cases, though properly involving surrenders by operation of law, are sometimes considered under express surrenders.

(l) *Shepard v. Spaulding*, 4 Metc. (Mass.) 416.

(m) *Goodright d. Nicholls v. Mark*, 4 Maule & Sel. 33.

(n) *Nickells v. Atherstone*, 10 Q.B. 944.

plication to them at all.(o) Thus a verbal agreement by two tenants of different landlords to exchange and pay each other's rent, assented to by the common agent of both landlords, and followed by each taking possession pursuant to the contract, has been held valid as a surrender, each tenant being substituted in place of the other.(p)

What constitutes a sufficient performance is sometimes difficult to determine. A change of possession in pursuance of the verbal agreement is generally regarded as the most important element. Lord Chancellor Sugden, in an Irish Chancery case,(q) while admitting under *Donohoe v. Conrahy*(r) and *Wills v. Stradling*(s) that mere continuance in possession as tenant is not part performance of a contract to grant a lease, held that where, however, it was a question whether a contract for a tenancy had been abandoned by mere loose conversation, the facts of possession and payment of rent continued during and after such conversation, were evidence to rebut such abandonment.(t) A parol agreement executed by which an old prescriptive right of way was given up, and a new way substituted, was held to afford no evidence of abandonment.(u)

§ 782. The cancellation or destruction of the instrument by which an estate in land has been created, will not, by implication of law, operate as a surrender of such estate, although the cancellation or destruction be done with the consent of all the parties, and for that express purpose. A large number of authorities will be found in the note which recognize this doctrine.(v) The grantee may indeed destroy the instrument by which his estate is evidenced, but he cannot transfer or part with his title, except in some of the forms prescribed by law. He may deprive

Cancellation, &c., of lease or deed not a surrender, though evidence of it; early cases compared.

(o) *Bliss v. Gardner*, 2 Bradw. 423, and cases cited; *Logan v. Anderson*, 2 Doug. Mich. 103; *Rachel v. Pearsall*, 8 Mart. Rep. 702; *McKenzie v. Lexington*, 4 Dana (Ky.), 131; *Wiley's Estate*, 6 W. N. C. (Phila.) 208; *Greider's Appeal*, 5 Pa. St. 422; *Lamar v. McNamee*, 10 G. & J. 116; see chapter XXIV. *et seq.* on "Performance."

(p) *Bees v. Williams*, 2 Cr. M. & R. 541; *S. C. Tyr. & Grang.* 23.

(q) *Moore v. Crafton*, 3 Jones & Lat. 444.

(r) 2 Jones & Lat. 688.

(s) 3 Ves. 378.

(t) See 19 & 20 Vict. c. 97, § 4, in Appendix.

(u) *Lovell v. Smith*, 3 C. B. N. S. 125; see *Reignolds v. Edwards, Willes*, 282; *Hamilton v. White*, 1 Seld. 9.

(v) *Woodward v. Aston*, 1 Vent. 296; *Roe d. Berkeley v. Archbishop of York*, 6 East, 101; *Bolton v. Bishop of Carlisle*, 2 H. Bl. 259; *Doe v. Hirst*, 3 Stark. N. P. 60; *Perrott v. Perrott*, 14 East, 439; *Doe v. Bingham*, 4 B. & Ald. 672; *Ward v. Lumley*, 5 H. & N. 87;

himself of his remedies upon the covenants contained in his deed, but not of his right to hold the property.(w) So, it seems that an endorsement of a lease by the lessor releasing the lessee from the covenants of the lease, does not take away the right of distress, though it would prevent an action of covenant.(x)

Id. 656; *Wootley v. Gregory*, 2 Y. & J. 536; *Clavering v. Clavering*, Prec. Ch. 235; *Washington v. Ogden*, 1 Black, U. S. 450; *Kimball v. Greig*, 47 Ala. 230; *Reavis v. Reavis*, 50 Ala. 60; *Germon v. Davis*, 36 Ala. 591; *Fawcett v. Kimon*, 33 Ala. 264; *O'Conner v. Auditor*, 27 Ark. 243; *Cranmer v. Porter*, 41 Cal. 462; *Ahrens v. Adler*, 33 Cal. 608; *Bowman v. Cudworth*, 31 Cal. 149; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Conn. 262; *Jordan v. Pollock*, 14 Ga. 145; *Speer v. Speer*, 7 Ind. 178; *Blaney v. Hanks*, 14 Ia. 400; *Suydam v. Beals*, 4 McLean, 12; *Holmes v. Trout*, 7 Peters, 213 (under law of Ky.); *Nason v. Grant*, 21 Me. 160; *Chase v. Hinckley*, 74 Me. 181; *Marshall v. Fisk*, 6 Mass. 24; *Hatch v. Hatch*, 9 Mass. 307; *Holbrook v. Tirrel*, 9 Pick. 105; *Cheesman v. Whittemore*, 23 Pick. 231; *Gugins v. Van Gorder*, 10 Mich. 523; *Bolton v. Wells*, 30 Miss. 692; *Alexander v. Hickox*, 34 Mo. 496; *Parsons v. Parsons*, 45 Mo. 268; *Wilson v. Hill*, 2 Beasley, 150; *Alpaugh v. Roberson*, 12 C. E. Gr. 96; *Farrar v. Farrar*, 4 N. H. 194; *Schutt v. Large*, 6 Barb. 373; *Parshall v. Shirts*, 54 Barb. 104; *Nicholson v. Halsey*, 1 Johns. Ch. 417; *Jackson v. Anderson*, 4 Wend. 474; *Jackson v. Page*, 4 Wend. 585; *Rowan v. Lytle*, 11 Wend. 616; *Jackson v. Gould*, 7 Wend. 364; *Jackson v. Chase*, 2 Johns. 84; *Jackson d. Butler v. Gardner*, 8 Johns. 394; *Kellogg v. Rand*, 11 Paige, 59; *Lewis v. Payne*, 8 Cow. 71; *Raynor v. Wilson*, 6 Hill, 469; *Doe d. Linker v. Long*, 64 N. Car. 296; *Howard v. Huffman*, 3 Head, 562; *Galbreath v. Tem-*

pleton, 20 Tex. 47; *Van Hook v. Simmons*, 25 Tex. 333 (Jupp); *Wilke v. Wilke*, 28 Wis. 296; *Howe v. Carpenter*, 49 Wis. 697; *Parker v. Kane*, 4 Wis. 12; *S. C. 22 Howard*, 1; *Lampe v. Kennedy*, 56 Wis. 249; *Rogers v. Rogers*, 10 No. West. Rep. S. C. Wis. 3; *Fraser v. Fraser*, 14 U. C. C. P. 70.

See as to the effect of the destruction of an indenture of apprenticeship, *Rex v. Inhab. of Fitchfield*, Burr. S. C. 511; *Rex v. Inhabitants of St. Mary Kalendar*, Burr. S. C. 274. In *Cannon v. Collins*, 3 Del. Ch. 132, the grantor and grantee agreed that the deed should be destroyed for a certain consideration which was paid, both parties supposing that the destruction of it was sufficient in law to revest in the grantor the title to the land. The grantee, however, retained his deed, and claimed title under it. The grantor having brought a bill in equity for specific performance of this alleged contract for a reconveyance; said Chancellor Bates in delivering the opinion of the court: "As they erred in this, equity will compel the grantee, he having received the consideration for revesting the title to adopt the appropriate legal method of effecting it, i. e., by a reconveyance." The equity of the plaintiff was rested upon his part performance of the agreement, but this must be regarded as an extreme case.

(w) *Cheesman v. Whittemore*, 23 Pick. 234; *Rifener v. Bowman*, 53 Pa. St. 313; *Viner, Abr. Fait*, X. 2.

(x) *Lauer v. White*, 18 U. C. C. P. 99.

Two persons each of whom owns and occupies a tract of land under a "bond for title" cannot, under the Statute of Frauds, exchange the tracts by "surrendering" them, and delivering their respective title bonds to each other.^(y) The same rule, it may be noticed, applies also to things lying in grant after the transmutation of possession.^(z) The rule in California under the Code is the same also.^(a) Nor is there any difference between cancellation and surrender in this respect, according to the best authority, though such a distinction has apparently been taken.^(b)

It was at one time indeed held, contrary to the rule as stated, that the destruction or cancellation of a deed would operate as an implied surrender of the estate. "Since the Statute of Frauds," it was said, "which makes all leases for above three years to have only the force and effect of leases at will, unless they be in writing, &c., the deed, or writing whereby such lease is made, seems to be of the same essence as the lease itself, and, therefore, the canceling or destruction of that seems to destroy and avoid the lease itself, because it destroys all evidence allowed by law for the support thereof."^(c) A view more consistent with the spirit of the statute was taken in the case of *Magennis v. MacCullough*,^(d) where the reason was given that the intent of the statute having been to take away the former method of transferring interests in lands by signs, symbols, and words only; that therefore, "as livery and seisin on a parol feoffment was a sign of passing the freehold before the statute, but is taken away by it, so the canceling was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party.

A surrender and cancellation of a lease, or similar instrument, with the consent of the parties, is, nevertheless, a circumstance to be con-

(y) *Connor v. Tippet*, 57 Mississippi, 594.

(z) *Morgan v. Elam*, 4 Yerger, 413; *Nelthorpe v. Dorrington*, 2 Lev. 113. In *Bolton v. Bishop of Carlisle*, 2 H. Black., 259, it was held that the cancellation of a deed does not divest property which has once vested by transmutation of possession, and that this rule applied to matter lying in grant as well. Compare *Woodward v. Aston*, 1 Vent. 297, where it was said that a rent was not

lost after the destruction of the deed as a bond or chose in action was.

(a) *Lawton v. Gordon*, 34 Cal. 38; *Bowman v. Cudworth*, 31 Cal. 149; *Killey v. Wilson*, 33 Cal. 693; *Kearns v. Killian*, 18 Cal. 493.

(b) *Patterson v. Yeaton*, 47 Me. 311; see *Mussey v. Holt*, 4 Foster, 252.

(c) *Bac. Abr. title Leases T.*, said to be the production of Chief Baron Gilbert; *Roberts on Frauds*, *249.

(d) *Gilb. Eq. Rep.* 235.

sidered. In a case where the lease was produced from the custody of the lessor's attorney, with the names of the parties torn off, it was held, first, that there was no surrender by operation of law, and secondly, that there was not even *prima facie* evidence of a surrender by deed or note in writing, and that the lease was therefore evidence of the lessor's title. "The fact of the lease being found in the possession of the lessor in a canceled state," said Parke, B., in delivering judgment, "merely raises a presumption that it was the *intention* of the parties to put an end to the term by canceling the instrument."^(e) The cancellation is strictly evidence simply of the intention of the parties,^(f) and coupled with other circumstances, as lapse of time, change of residence, acquiescence, conveyance to a third party, &c., will make it a question for the jury to presume a reconveyance or surrender, according to the intention thus expressed.^(g)

In the case last cited a new lease having been executed to a third party, the old lease was produced from the custody of the lessor with the seals torn off. This fact, together with proof of a custom to send in old leases to the lessor's office before a renewal was made, was held evidence from which a jury might infer a surrender of the first lease.^(h) But of course, if the terms of the statute are complied with by a writing, it is not necessary to destroy or cancel the lease in order to complete the surrender. ⁽ⁱ⁾ In any event, if the surrender of the deed or lease were only for the purpose of alteration, or if the cancellation were done by mistake, the intention of the parties not being to effect a surrender of the estate, their acts will not be held to accomplish that result.^(j)

§ 783. There is, however, a class of cases in which the cancellation or destruction of the deed has been held to revest the title which it evidenced. In a number of the United

(e) Doe d. Courtail v. Thomas, 9 B. & C. 288; Littledale, J., distinguishing Farmer v. Rogers, 2 Wils. 26, and Smith v. Mapleback, 1 T. R. 441, where there was a note in writing. See Howard v. Huffman, 3 Head, 562.

(f) Ward v. Lumley, 5 H. & N. 87; Id. 656.

(g) Fraser v. Fralick & Fraser, 21 U. C. Q. B. 343; Doe d. Burr v. Denison, 8 U. C. Q. B. 185; Jackson d. But-

ler v. Gardner, 8 Johns. 394; Walker v. Richardson, 2 M. & W. 882.

(h) Walker v. Richardson, 2 M. & W. 882.

(i) Greider's Appeal, 5 Pa. St. 429.

(j) Montgomery v. Bevans, 1 Sawyer, C. C. 661; Perrott v. Perrott, 14 East, 439. And see Doe v. Bingham, 4 B. & Ald. 672; Booker v. Stivender, 13 Rich. Law, 85.

States, under the effect given to the several recording acts, the cancellation of an *unrecorded* deed, or its redelivery to the grantor for the purpose of cancellation, is allowed to revest the title without further formality. unrecorded deed; rule of some States; doctrine of estoppel.

Such is the doctrine maintained in New Hampshire,^(k) Vermont,^(l) Massachusetts,^(m) Pennsylvania,⁽ⁿ⁾ Maine,^(o) North Carolina,^(p) Michigan, though not, it is said, unless the preponderance of testimony is clear;^(q) and New Jersey.^(r) "There can be no doubt," said Chancellor Pennington in the case last cited, "that parties to a deed in a case not affecting third parties may by agreement cancel it if it be not recorded; but such course is not advisable, as the party destroying the instrument must in all cases show his authority for so doing."

The doctrine is maintained in some cases upon the ground that by the deed executed and delivered, but unregistered, an equitable estate merely is conveyed, and the parties may, therefore, by parol rescind the contract or conveyance by re-exchanging the deed and the consideration.^(s) But the more usual theory is that if the deed were given up with the intention of revesting title, the grantee is estopped from setting it up; and not that the acts and agreements of the parties operate as a reconveyance in opposition to the statute.^(t) A third party, it is held, will not be permitted to set up the statute to invalidate a parol agreement to rescind a conveyance by deed executed but not recorded.^(u)

An equal number of cases, perhaps, hold that such an effect will

(k) *Tomson v. Ward*, 1 N. H. 9; *Farrar v. Farrar*, 4 N. H. 191; *Dodge v. Dodge*, 33 N. H. 497; *Sawyer v. Peters*, 50 N. H. 143; *Mussey v. Holt*, 4 Foster, 252. But the deed must be actually canceled and not merely surrendered.

(l) *Corliss v. Corliss*, 8 Vt. 373.

(m) *Holbrook v. Tirrell*, 9 Pick. 105; *Trull v. Skinner*, 17 Pick. 213; *Sherburne v. Fuller*, 5 Mass. 133; *Commonwealth v. Dudley*, 10 Mass. 403; *Marshall v. Fisk*, 6 Mass. 24; *Steel v. Steel*, 4 Allen, 417; *Lawrence v. Stratton*, 6 Cush. 163; *Howe v. Wilder*, 11 Gray, 267.

(n) (*Semble*) *Harmony National Bank's Appeal*, 101 Pa. St. 428.

(o) *Nason v. Grant*, 21 Me. 160; *Patterson v. Yeaton*, 47 Me. 311; *Chase v. Hinckley*, 74 Me. 181.

(p) *Davis v. Inascoe*, 84 N. Car. 396; *Love v. Belk*, 1 Ired. Eq. 163; *Waugh v. Blevins*, 68 N. Car. 168.

(q) *Hunter v. Hopkins*, 12 Mich. 227.

(r) *Faulks v. Burnes*, 1 Green, Ch. 252.

(s) *Davis v. Inascoe*, 84 N. Car. 396.

(t) *Bank v. Eastman*, 44 N. H. 438, and cases cited; *Trull v. Skinner*, 17 Pick. 215; *Thompson v. Thompson*, 9 Ind. 328; *Chase v. Hinckley*, 74 Me. 181.

(u) *Davis v. Inascoe*, 84 N. Car. 400; *Green v. R. R. Co.*, 77 id. 95; *Faulks v. Burnes*, 1 Green, Ch. 252.

not be given to the surrender or cancellation of an unrecorded deed. Such is the doctrine at least in Ohio,^(v) Connecticut,^(w) Arkansas,^(x) New York,^(y) Kentucky,^(z) Wisconsin,^(a) Indiana,^(b) Alabama,^(c) South Carolina.^(d) Saving at least such cases as would involve a fraud, when the doctrine of estoppel,^(e) or that of a constructive trust,^(f) will be invoked against grantee or grantor, as the case may be.^(g)

In *Hall v. McDuff*,^(h) a grantee in occupation of the premises under an unrecorded deed, delivered it back to have security given by mortgage for a part of the consideration-money. The grantor having made an absolute conveyance to a third party, it was held that the title had not reverted in the grantor, because such did not appear to have been the intention of the parties, the deed having been pledged merely as an equitable mortgage of the estate. In an early case in New York,⁽ⁱ⁾ where after the re-delivery and cancellation of a lease the lessee took a new lease; before the execution of which a third person received a deed in fee for the lands (which the said third party held for many years), it was held that the lessee must clearly make out his title under the old lease.

Another exception should be noticed to the general rule, viz., that when the deed is fraudulently altered by the grantee it is no longer evidence, and judgment in ejectment by the grantor will go

(v) *Jeffers v. Philo*, 35 Ohio St. 173; *Dukes v. Spangler*, 35 Ohio St. 119.

(w) *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 Conn. 262. In *Coe v. Turner*, 5 Conn. 86, a conveyance was made in trust for the grantor's wife. The trustee executed and delivered a deed to the wife; but she with the assent of the trustee, but without the assent of her husband, canceled it before it was recorded. Note, however, that the grantee, being a married woman, was incompetent to convey, save in a certain prescribed manner.

(z) *Taliaferro v. Rolton*, 34 Ark. 503; *Strawn v. Norris*, 21 Ark. 80.

(y) *Raynor v. Wilson*, 6 Hill, 467.

(x) *Holmes v. Trout*, 7 Peters, U. S. 213.

(a) *Parker v. Kane*, 4 Wis. 12; S. C.

22 How. 1; *Wilke v. Wilke*, 28 Wis. 296; *Lampe v. Kennedy*, 56 Wis. 249, and cases cited.

(b) *Connelly v. Doe*, 8 Blackf. 320; *Rinker v. Sharp*, 5 Blackf. 185; *Orth v. Jennings*, 8 Blackf. 420. But see *Thompson v. Thompson*, 9 Ind. 328.

(c) *Smith v. Cockrell*, 66 Ala. 64; *Carithers v. Lay*, 51 Ala. 390; compare *Mallory v. Stodder*, 6 Ala. 808.

(d) *Cornwell v. Spence*, Harp. Ch. 258.

(e) *Jeffers v. Philo*, 35 Ohio St. 173; see *Dodge v. Dodge*, 33 N. H. 487.

(f) *Taliaferro v. Rolton*, 34 Ark. 503; *Strawn v. Norris*, 21 Ark. 80.

(g) *Carithers v. Lay*, 51 Ala. 390; *Cornwell v. Spence*, Harp. Ch. 258.

(h) 24 Me. 311.

(i) *Jackson d. Butler v. Gardner*, 8 Johns. 394.

against the grantee, as he has no competent evidence of title.(j) Nor can the grantee, by canceling his own deed and procuring a conveyance to another, defeat his own creditors.(k) So if by the re-delivery to the grantor, the grantee enables the former to sell or incumber the premises, he is estopped as to third parties from invalidating the effect of his own act.(l) Again, it has been held that where the grantee canceled his deed and procured a conveyance from his grantor to a third party, that the latter's title was valid although both grantees continued in joint possession of the premises.(m)

§ 784. Another exception occurs in case of a mortgage or defeasance, the cancellation or redelivery of which is effective as a surrender. Thus where the defeasance alone was canceled and surrendered it was held that an absolute estate vested in the mortgagee, Shaw, C. J., saying: "Such cancellation does not operate by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence by which alone the claim could be supported." (n) The rule was clearly stated in *Richard v. Syms*.(o) In that case the mortgagee gave the mortgage and bond to the mortgagor, saying: "Take back your writings, I freely forgive you the debt." Said Lord Chancellor Hardwicke: "There is a difference both in law and equity between absolute estates in fee or for a term of years and conditional estates for securing the payment of a sum of money. In the case of absolute estates it cannot be admitted of, that parol evidence of the gift of deeds shall convey the land itself. But where mortgage is made of an estate that is only considered as a security for money due, the land is the accident attending upon the other, and when the debt is discharged the interest in the land follows of course." "Here is a mortgage made and a bond entered into for the performance of the covenants contained in it. Suppose an obligee delivers up a bond with intent to discharge the debt, the

Destruction
&c., of bond
and mort-
gage.

(j) *Chesley v. Frost*, 1 N. H. 145.

(k) *Marshall v. Fisk*, 6 Mass. 24.

(l) *Mallory v. Stodder*, 6 Ala. 808;
Barrett v. Thorndike, 1 Greenl. 78;
Holbrook v. Tirrell, 9 Pick. 105;
Lampe v. Kennedy, 56 Wis. 249.

(m) *Commonwealth v. Dudley*, 10 Mass. 408 (see note to this case).

(n) *Trull v. Skinner*, 17 Pick. 213;
Harrison v. Phillips, 12 Mass. 465;
Rice v. Rice, 4 Pick. 349; but see *Howe v. Carpenter*, 49 Wis. 697.

(o) *Barnardiston*, Ch. 90 (1740).

debt will be discharged, and if the bond is discharged in the present case the mortgage will be discharged with it.”(p) But where a mortgagee canceled a mortgage and it was so found in his possession, Lord Hardwicke said it was as much a release as canceling a bond though it did not convey or revest the estate in the mortgagor, for that must be done by some deed.(q)

Even in those States in which the cancellation of the deed is held to revest title in the grantor, that effect is not given to a *promise* by a grantee, conditional or otherwise, to return or cancel his deed so as to divest himself of his title. Evidence of such a parol agreement is inadmissible;(r) it is a promise concerning land, and must be proved by a writing.(s) But in Michigan a suit for the consideration of a parol contract for the surrender of a contract to convey land has been maintained.(t)

§ 785. We have already noticed to some extent those cases where a lessee, by accepting a new lease before the expiration of the old one, and thereby recognizing the power of the lessor to make a valid lease, will be held to have surrendered his term. It has indeed been said that the term “act and operation of law” should be expressly limited to such cases.(u) But it is now well established that a lease granted to a third party who takes possession with the lessee’s consent will have the same effect. We will first consider the former class more particularly, and then pass to the latter.

In the first place, a new lease to effect a surrender of an old one

(p) The rule was also recognized or applied in *Wentz v. Dehaven*, 1 S. & R. 317, following *Martin v. Maowlin*, 2 Burr. 969, 979; *Runyon v. Mersereau*, 11 Johns. 534; *Wilson v. Troup*, 2 Cow. 195; *Merrill v. Chase*, 3 Allen, 339; *Claffin v. Godfrey*, 21 Pick. 1; *Cutler v. Haven*, 8 Pick. 493. See *dictum* contra in *Purser v. Anderson*, 4 Edw. Ch. 17; and also the later Pennsylvania cases of *Whitehill v. Wilson*, 3 P. & W. 405; *Campbell’s Est.*, 7 Pa. St. 100; *Ackla v. Ackla*, 6 Pa. St. 288, and *Kidder v. Kidder*, 33 Pa. St. 268, requiring such parol surrender to be supported by a consideration, and as to this point over-

ruling *Wentz v. De Haven*, 1 S. & R. 317.

(q) *Harrison v. Owen*, 1 Atk. 520.

(r) *Sherburne v. Fuller*, 5 Mass. 138; *Storch v. Carr*, 28 Pa. St. 138; *Mussey v. Holt*, 24 N. H. 252; *Barrett v. Barron*, 13 N. H. 162; *Morse v. Child*, 6 N. H. 521; see *Farrar v. Farrar*, 4 N. H. 191, and *Cross v. Powell*, Cro. Eliz. 483.

(s) *Sherburne v. Fuller*, 5 Mass. 138.

(t) *Sullivan v. Durnam*, 42 Mich. 519.

(u) *Rowan v. Lytle*, 11 Wend. 616; *Lyon v. Reed*, 13 M. & W. 301.

must be valid.(v) It was indeed ruled in *Mellows v. May*,(w) that where a lessee for life accepted a lease for three lives, which was void, being granted to begin from a future date, an implied surrender of the first lease was effected, and it was stated that if a lessee accepts a grant of a rent-charge issuing out of the same land to begin presently, it would work an immediate surrender of his estate.(x) As to the first point, the later cases which have been cited above have overruled *Mellows v. May*.(y)

The acceptance of a new lease from the assignee of the lessor with his knowledge and consent will constitute a surrender.(z) The second lease need not be as long as the first; thus in an old English case,(a) a lease for ninety-nine years was held to be surrendered by the acceptance of a *parol* lease for eighteen years. The general rule will apply even if the new lease is granted to begin *in futuro*, provided it be a valid one.(b) But if the second lease becomes void upon the happening of a contingency, it shall not by relation disannul the previous surrender which had happened.(c) And so when a lease is made in consideration of the surrender of an old lease and the surrender is so made, an avoidance of the new lease will not revive the old lease, the surrender being by deed and not by operation of law.(d) And from the emphasis given to the mode of surrender, we may infer that had the surrender been only implied, the prior lease would be validated.(e) It might be thought difficult to account for the distinction, because, as the acceptance of the new lease without more works a surrender, no deed is necessary, and its only effect would be to evidence the fact of surrender.(f)

In a case in England,(g) an agreement signed by the landlord for

(v) *Davison d. Bromley v. Stanley*, 4 Burr. 2210; *Doe d. Bp. of Rochester v. Bridges*, 1 B. & Ad. 860; *Schieffelin v. Carpenter*, 15 Wend. 400; *Smith v. Niver*, 2 Barb. 180; *Watt v. Maydewell*, Hutt. 104; *Lloyd v. Gregory*, Sir W. Jones, 406; *Wilson v. Sewell*, 4 Burr. 198.

(w) Cro Eliz. 874, note, refers to 4 Geo. I. c. 28.

(z) Year Book, 21 Hen. VII. pl. 7.

(y) Cro Eliz. 874. See, however, report of S. C. Moore, 637, where the lease is said to have been good because livery of seisin was given subsequently.

(z) *Lewis v. Brooks*, 8 U. C. Q. B. 576.

(a) *Whitley v. Gough*, Dyer, 140 b.

(b) *Watt v. Maydewell*, Hutt. 104; *Ive v. Sams*, Cro. Eliz. 521.

(c) *Whitley v. Gough*, Dyer, 140 b; *Fulmeston v. Stewart*, Plow. 107(a); *Doe v. Poole*, 11 Q. B. 716.

(d) *Roe d. Earl of Berkeley v. Archbishop of York*, 6 East, 101; *Doe d. Bp. of Rochester v. Bridges*, 1 B. & Ad. 847.

(e) See *Whiteley v. Gough*, Dyer, 140 b.

(f) *Lyon v. Reed*, 13 M. & W. 285.

(g) *Pym v. Blackburn*, 3 Ves. Jr. 34.

a new lease with blanks therein for the date of beginning was held not to operate as a surrender of the existing lease, though the new lease was in consideration of repairs, and the landlord offered the lease as soon as the repairs were completed. In another case^(h) it was held that when a tenant, together with a third person, enters into a written agreement with his landlord that the latter shall give a new lease to the tenant and the third person jointly, and the two latter enter into possession though no lease was ever executed, the first tenancy was determined; *Roe d. Earl of Berkeley v. Archbishop of York*⁽ⁱ⁾ being distinguished. The first lease being surrendered, it follows that all rights of the lessee annexed thereto are gone. Thus in New York a tenant for years having accepted a new lease of the same premises, it was held that a right of common, given him by the first lease, was extinguished.^(j)

§ 786. An agreement, however, for a new lease will not effect a surrender of an existing lease by operation of law, unless the new lease is executed so as to pass an interest according to the contract and intention of the parties.^(k) But if such an interest is passed, the acceptance of a new lease for a less period,^(l) and covering only a part of the premises, will merge and supersede the first one.^(m) And so a parol agreement by which the lessor resumed possession of part of the leased premises, and the lessee remained in possession of the other part at a reduced rent, has been sustained, and the lessee cannot plead an eviction in an action for the rent according to the modified agreement.⁽ⁿ⁾ But the presumption of surrender arising from the taking a new lease (in this case during a parol demise), may be overcome by showing that such was not the intention of the parties.^(o)

§ 787. As we have seen to be the case in express surrender, so the surrender implied in thus taking a new lease may be only conditional. Examples of the judicial con-

(h) *Hamerton v. Stead*, 5 D. & R. 206.

(i) 6 East, 101.

(j) *Livingston v. Potts*, 16 Johns. 28, commenting on *Livingston v. Ten Broeck*, 16 Johns. 14.

(k) *Coe v. Hobby*, 72 N. Y. 141.

(l) This was true before the statute; *Dodd v. Acklom*, 6 M. & G. 679.

(m) *Roe d. Earl of Berkeley v. Arch-*

bishop of York, 6 East, 102; *Banker v. Braker*, 9 Ab. N. C. 413; see *Ramsay v. Stafford*, 28 U. C. C. P. 229; and *Fish v. Campion*, 2 Roll. Abr. 498.

(n) *Lounsbury v. Snyder*, 31 N. Y. 516.

(o) *Abell v. Williams*, 3 Daly, 17; *Livingston v. Potts*, 16 Johns. 28; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Flagg v. Dow*, 99 Mass. 18.

struction of such surrenders may be found in the cases cited in the note.(p) In a case of this class(q) a tenant from year to year entered into a written agreement with his landlord to purchase the estate. It was held there was an implied condition in the contract that the landlord should make out a good title, and that therefore the agreement for the purchase did not operate as a surrender of the tenancy by operation of law.

§ 788. The question has often arisen whether a verbal agreement of the parties to a lease written or otherwise, during the continuance of the term for a reduction of rent, will create a new demise and work a surrender of the old term. It was held in *Crowley v. Vitty*(r) that it would not, although in that case the reduced rent was paid and on two occasions distrained for. "The transaction," said Parke, B., "really amounts to no more than an indulgence on the part of the landlord, which may be put an end to at any time." The parol agreement is neither an abandonment of the former contract "as a sort of implied surrender," nor does it operate as a substitution of the new agreement for the former one, nor as the creation of a new tenancy in which the old tenancy merges. Said Lord Chancellor Sugden in a similar case(s) to *Crowley v. Vitty*:(t) "I should do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would altogether put an end to the existing contract and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it."(u) So a collateral contract, even by deed, for an increase of rent in consideration of improvements by the lessor, does not evidence a surrender of the old lease.(w)

§ 789. There is a large number of cases where the lessee by assenting to his lessor's grant to a third person who enters into possession, admits his lessor's power to make such lease, and thus surrenders his own term. The leading

Oral agreement for increase or reduction of rent not a surrender.

Surrender by assent to lessor's grant to

(p) *Doe d. Biddulph v. Poole*, 11 Q. B. 713; 17 L. J. Q. B. 143; *Whitney v. Myers*, 1 Duer, 266.

(q) *Doe d. Gray v. Stanion*, 1 M. & W. 695.

(r) 7 Exch. 319, S. C. 21 L. J. N. S. Exch. 135.

(s) *Clarke v. Moore*, 1 J. & Lat. 723, 729.

(t) *Supra*.

(u) See *Foquet v. Moor*, 7 Exch. 870; *Coe v. Hobby*, 72 N. Y. 141; 6 N. Y. Wk. Dig. 133.

(w) *Abinger, C. B.*, in *Lambert v. Norris*, 2 M. & W. 333.

third party; case is *Thomas v. Cook*,^(x) which has been generally followed both in England and this country. It was indeed intimated in *Lyon v. Reed*,^(y) that in view of the application to freehold interests. language of the Statute of Frauds, such acts *in pais* could not operate as a surrender, and a case *contra*^(z) was distinguished as not passing directly upon the point; while *Thomas v. Cook* was questioned as a *nisi prius* decision (though admitted to have been followed), and explained on the ground of the actual occupation by the landlord's new tenant having the effect of an eviction by the landlord, and therefore suspending the rent during the continuance of such occupation. A third case^(a) was also distinguished as involving an interest which did not lie in the grantor. *Lyon v. Reed*, however, itself did not call for a decision of the question as it concerned an incorporeal hereditament, which could only pass by deed, and the effect of the criticism upon the case as a precedent has been removed by later decisions.^(b) The doctrine of *Thomas v. Cook*, however, has been regarded as unsafe by very eminent authority.

It was held in Ireland,^(c) and seems now to be settled, that the rule of *Thomas v. Cook* applies to the case of a surrender of a freehold interest. In a subsequent case, however,^(d) Sir E. Sugden in the course of his opinion remarked: "The case of *Thomas v. Cook* established a new doctrine, but it proceeded upon the act of the former tenant, who had placed another in possession and agreed to the latter becoming immediate tenant to the landlord; and it is so explained in *Johnstone v. Huddleston*, 4 B. & C. 933, by Mr. Justice Bayley, who joined in the decision in *Thomas v. Cook*. But I entirely concur in the reasons given by Mr. Baron Parke, in delivering the judgment of the court in *Lyon v. Reed*. If *Thomas v. Cook* is not to be overruled, the doctrine should not be carried further. The case of *Lynch v. Lynch* was relied upon as an authority that the doctrine applies equally to a freehold interest like that in this case, and no doubt the point was so decided. But with all my respect for the judges

(x) 2 B. & Ald. 119.

Nickells v. Atherstone, 10 Q. B. 944.

(y) 13 M. & W. 307.

See *Rex v. Banbury*, 3 Nev. & M. 292;

(z) *Stone v. Whiting*, 2 Stark. 210.

Walker v. Gode, 6 H. & N. 594.

(a) *Walker v. Richardson*, M. & H. (New T. R.) 251; S. C. 2 M. & W. 882.

(c) *Lynch v. Lynch*, 6 Ir. L. R. 131.

(b) *Davison v. Gent*, 1 H. & N. 744; & *Lat.* 133; 8 Ir. Eq. 688.

who decided that case, I cannot follow it. I never so understood the law, and the authorities quoted in *Lyon v. Reed* would seem to establish the contrary to be the law." But in a still later case^(e) *Torrens, J.*, expressed himself as bound by the authority of *Lynch v. Lynch*, but as it was not in point of fact a case involving the surrender of a freehold interest, *Ball, J.*, concurred in the decision reached, acting neither upon nor against the authority of that case, though saying he would be slow to overrule it.

§ 790. *Thomas v. Cook* has also been seriously doubted in this country. In New Jersey,^(f) *Beasley, C. J.*, after alluding to the injurious if not fatal criticism by *Baron Parke*, in *Lyon v. Reed*, stated his opinion to be that to hold "that a surrender in law will be implied or raised up from the facts that a tenant has put a third person in possession of the demised premises, and that such third person has been accepted as tenant with the assent of the original tenant, is carrying the principle to the verge of mischief to titles by leasehold." An important case in this country is *Schieffelin v. Carpenter*.^(g) The plaintiff sued for rent under a written lease for six years. The defendant claimed that a parol agreement had been made by which the lease was to be surrendered and a new lease made for eight years to third parties, to whom the defendant gave up possession, which they kept up for a year. It was held that there being no proof of the execution of the second lease, it amounted only to a tenancy at will, and the defendant was liable under the old lease. As was subsequently observed,^(h) there was nothing done in that case inconsistent with the relation of landlord and tenant between the owner and the original lessee. The acts of all the parties were to be construed and qualified by a reference to the executory character of the agreement under which they acted, and their mutual expectation that a new lease would be given and received.⁽ⁱ⁾ "But it has never been decided," it was said in *Smith v. Niver*,^(j) commenting on *Schieffelin v. Carpenter*, "that a lessor who has consented to a change of tenancy and permitted a change of

Discussion
of rule of
Thomas v.
Cook in
United
States.

(e) 1 *Lynch v. Collins* (1856), Ir. Jur. N. S. 211.

(h) *Hegeman v. McArthur*, 1 E. D. Smith, 149.

(f) *Hunt v. Gardner*, 39 N. J. L. Rep. 530.

(i) Compare *Laughran v. Smith*, 4 N. Y. Wk. Dig. 594; 11 Hun, 311.

(g) 15 Wend. 407.

(j) 2 Barb. 180.

occupation, and received rent from the new tenant as an original, and not as a sub-tenant, can afterwards charge the original tenant for rent accruing during the occupation of the new tenant." The principle of *Thomas v. Cook* recognized in this case has been repeatedly followed in this country, and the doctrine of implied surrender sustained.(k)

§ 791. It has been moreover held that the agreement to release the original lessee and accept another, need not be express but may be inferred.(l) In the Illinois case cited it was held that although the premises were originally leased to one tenant, yet if another occupied one-half of them and the lessor collected one-half the rent from him several times, it amounted to a recognition of a separate tenancy. A mere agreement between the parties, however, for such new lease will not without more effect a surrender of the old one.(m) Unless, indeed, though the agreement is not fulfilled by the actual execution of a new lease, the new lessee makes actual entry upon the leased premises.(n) Though the cases are not altogether harmonious, it may be said that the acts *in pais* essential are possession taken by the new lessee,(o) consent of the former lessee,(p) and acceptance by the lessor of the new lessee as his tenant.(q)

(k) *Wood v. Wallbridge*, 19 Barb. 138; *Levering v. Langley*, 8 Minn. 107; *Whitney v. Myers*, 1 Duer, 266; *Murray v. Shaw*, 2 Duer, 182; *Dills v. Stobie*, 81 Ill. 202; *Baker v. Pratt*, 15 Ill. 568; *Clemens v. Broomfield*, 19 Mo. 118; *Bedford v. Terhune*, 30 N. Y. 453; *E. C. 1 Daly*, 371; 27 How. Pr. 422; *Horton v. Macconnichy*, 9 U. C. C. P. 186; *Ramsay v. Stafford*, 28 U. C. C. P. 229; and *Acheson v. McMurray*, 41 U. C. B. 484, where the authorities are reviewed.

(l) *Fry v. Partridge*, 73 Ill. 51; *Bedford v. Terhune*, 30 N. Y. 453.

(m) *Taylor v. Chapman*, Peake's Add. Cas. 19; *Lamott v. Gist*, 2 H. & G. 433; *Wilson v. Lester*, 64 Barb. 431.

(n) *Hamerton v. Stead*, 5 D. & R. 206; *S. C.*, 3 B. & C. 478, doubted in *Schieffelin v. Carpenter*, 15 Wend. 407. And see *Donellan v. Read*, 3 B. & Ad.

899; *Coe v. Hobby*, 72 N. Y. 141; *Rowan v. Lytle*, 11 Wend. 621.

(o) *Fraser v. Fralick*, 21 U. C. Q. B. 343; *Doe d. Burr v. Denison*, 8 U. C. Q. B. 185; *Taylor v. Chapman*, Peake's Add. Cas. 19; *Acheson v. McMurray*, 41 U. C. Q. B. 484.

(p) *Rex v. Stow Bardolph*, 1 B. & A. 219; *Lynch v. Lynch*, 6 Ir. L. R. 131; *Doe d. Huddleston v. Johnston*, *McClel. & Y.* 141.

(q) *Sparrow v. Hawkes*, 2 Esp. 504; *Matthews v. Sawell*, 8 Taunt. 270; *Lambert v. McDonnell*, 15 Ir. C. L. Rep. 136; *S. C.* 9 Ir. Jur. N. S. 371; *Elsworth v. Brice*, 18 U. C. Q. B. 441; *Stobie v. Dilla*, 62 Ill. 432; *Hesseltine v. Seavey*, 16 Me. 212; *Lamar v. McNamee*, 10 G. & J. 124; *Randall v. Rich*, 11 Mass. 494; *Smith v. Niver*, 2 Barb. 180; *Morgan v. Smith*, 70 N. Y. 546; *Swift v. Gage*, 26 Vt. 224; *Witman v. Watrey*, 31 Wis. 638.

And if there are two lessors, an agreement with one is not sufficient.(r)

Where a tenant by letter authorized the lessor to relet and he did so and gave possession, it was held to be a sufficient surrender on the ground of estoppel.(s) Receipt of rent from a third party is strong evidence of a change of tenancy with the consent of the landlord and of a surrender by operation of law.(t) And so when a landlord went to a sub-lessee and collected the rent, telling him not to pay to his lessor as "he had taken the place off his hands," it was held a surrender by operation of law.(u) Yet the mere receipt of rent is not conclusive of itself;(v) nor is it evidence at all of a surrender if the receipts are given as for rent due from the original lessee.(w)

The question of release of the original tenant and acceptance of the new tenant is one of fact.(x) In an English case,(y) where a tenant paid a quarter's rent on a quarterly pay-day, and was not afterwards seen on the premises, while thereafter a third person paid rent at irregular intervals, it was held to be correct to leave it to the jury to say whether the landlord had not accepted this third person as his tenant in substitution of the original tenant.(z)

§ 792. Giving up possession under a parol permission of the landlord without regular notice is not a surrender, and the tenant is still liable for the rent, unless, according to the cases already noted, the landlord agrees to accept a new tenant(a) or resumes possession.(b) Thus in a New

Giving up
possession;
notice to
quit;
breach of

(r) *Turner v. Hardey*, 9 M. & W. 775.

(s) *Nickells v. Atherstane*, 10 A. & E. N. S. 944.

(t) *Laurance v. Faux*, 2 F. & F. 436; *Logan v. Anderson*, 2 Doug. Mich. 101; see *Carter v. Hibblethwaite*, 6 U. C. C. P. 475, where the lessor, though agreeing verbally to the assignment, refused the rent when offered, and it was held that the assent was *nudum pactum* and revocable.

(u) *Bailey v. Delaplaine*, 1 Sandf. 5.

(v) *Copeland v. Watts*, 1 Stark. 76.

(w) *McLeod v. Darch*, 7 U. C. C. P. 35.

(x) *White v. Walker*, 31 Ill. 422; *Fry v. Partridge*, 73 Ill. 51; *Woodcock*

v. Nuth, 8 Bing. 170; *Powis v. Smith*, 5 B. & A. 850; *Fraser v. Fralick*, 21 U. C. Q. B. 343.

(y) *Woodcock v. Nuth*, 8 Bing. 170.

(z) See as to what on a landlord's part amounts to the acceptance of a surrender of a lease; *Harding v. Cret-horn*, 1 Esp. 57; *Dewey v. Dupuy*, 2 W. & S. 556; *Penn v. Auer*, 6 W. N. C. 449.

(a) *Lamar v. McNamee*, 10 G. & J. 116; *Kinsey v. Minnick*, 43 Md. 121; *Kittle v. St. Johns*, 7 Neb. 74; *Stotes-bury v. Vail*, 2 Beas. Ch. 390; *Morgan v. Smith*, 70 N. Y. 538; *Mollett v. Brayne*, 2 Camp. 103.

(b) *Lamar v. McNamee*, 10 C. & J.

covenant,
&c. York case,(c) the lessee gave up possession and the keys to the lessor under an agreement that the latter should relet on the lessee's account, but that the relations of the parties or the covenants of the lease should not be impaired. The agreement was held not to create an implied surrender. And it would seem that a mere offer to give up the key is not such acquiescence in an invalid notice to quit as would effect an implied surrender.(d) In another case,(e) where the tenancy was from year to year, from October 1st, the tenant gave a verbal notice on March 6th that he would vacate on April 1st. The lessor requested him to leave on March 15th, but he remained until April 6th. It was held that these facts did not constitute a surrender.(f) In fact, in *Doe d. Read v. Ridout*(g) it was queried whether a tenancy from year to year can be determined so as to bar the interest of the tenant's creditors, unless there be either a legal notice to quit or a surrender in writing.

We have already noticed cases in which an insufficient notice to quit, duly accepted, has been held to operate as a surrender in futuro, and need now only refer to those cases.(h) In New Hampshire it has been held that a parol agreement by a tenant in possession with a purchaser to vacate the premises on a given day, thereby waiving his notice to quit, was enforceable, the purchase being upon the faith of the promise.(i) In a case(j) where a lease for life contained a covenant that the lessee should not assign without the lessor's permission, an assignment with such permission did not operate as a surrender, but the lessee was liable for the performance of the covenants by the assignee. So an eviction by the landlord will suspend the rent, but the tenancy is not put an end to or the tenant discharged from performance of its conditions.(k) But where a tenant being disturbed in the

116; *Grimman v. Legge*, 8 B. & C. 324; (h) *Aldenburgh v. Peaple*, 6 C. & P. 212; *Doe d. Murrell v. Milward*, 3 M. 266; *Bird v. Defonville*, 2 C. & K. 415; & W. 332; *Weddall v. Capes*, 1 M. & Bessell v. Landsberg, 7 Q. B. 638; 14 L. W. 50; and cases cited *supra*, § 770.

J. Q. B. 355.

(c) *Morgan v. Smith*, 70 N. Y. 538.

(d) *Brown v. Burtinshaw*, 7 D. & R. 603.

(e) *Dayton v. Craik*, 26 Minn. 133.

(f) See *Kerr v. Simmons*, 8 Mo. App.

431.

(g) 5 Taunt. 519.

(i) *Moore v. Davis*, 49 N. H. 53; see opinion of Parke, B., in *Buttemere v. Hays*, 5 M. & W. 456.

(j) *Jackson d. Church v. Bronson*, 7 Johns. 227.

(k) *Morrison v. Chadwick*, 7 M. G. & S. 266.

enjoyment of the premises, gave up possession to the landlord, who resumed it, it was held to work a surrender.^(l) In England^(m) it was held that where a payment was made by a tenant and accepted by the landlord for rent up to a certain day in the middle of a quarter, and the landlord let part of the premises, and advertised the whole to let or for sale, there arose a surrender by operation of law; but in 1800⁽ⁿ⁾ it seems to have been thought that where a tenant has quitted without giving notice, the mere fact that the landlord put up a notice that the premises were to let, will not prevent him from recovering for use and occupation for a subsequent period.

The current of authority is to the effect that it is not necessary that possession should be taken by another, but that the resumption of possession by the landlord will be sufficient if by the consent of the lessee.^(o) And a parol surrender to a mortgagee who takes possession thereunder is competent evidence in an action of ejectment against him.^(p) It was indeed questioned in England,^(q) whether where a parol contract was executed whereby a tenant gave up possession of demised premises and the landlord excused payment of rent in consideration thereof, there was a technical surrender, or merely a contract entirely irrespective of the statute. In a late case,^(r) where a new tenancy was created between the parties of part of the demised premises at a reduced rate and possession was given up of the rest, it was held to be a question for the jury to determine. But certainly if the landlord takes possession and re-leases the land he is bound to a surrender by an estoppel, having the effect of a technical surrender.^(r')

In such cases, in the absence of any positive agreement, the de-

(l) *Hegeman v. McArthur*, 1 E. D. C. 6 M. & G. 679; *Peter v. Kendal*, 6 Smith, 149. The verbal denial by a tenant of his landlord's title does not work a forfeiture of the term or authorize the landlord to maintain ejectment; *De Lancey v. Ga Nun*, 12 Barb. 120, 9 N. Y. 9; *Doe d. Graves v. Wells*, 10 A. & E. 427; note (b) to *Leech's case*, *Freeman*, K. B. 503.

(m) *Reeve v. Bird*, 1 Cr. M. & R. 31.

(n) *Redpath v. Roberts*, 3 Esp. 225.

(o) *Grimman v. Legge*, 8 B. & C. 326; *Dodd v. Acklom*, 7 Scott, N. R. 415; S.

C. 6 M. & G. 679; *Peter v. Kendal*, 6 B. & C. 703; *Penn v. Auer*, 6 W. N. C. 447; *Auer v. Penn*, 92 Pa. St. 444; *Smith v. Pendergast*, 26 Minn. 319; see *Ladd v. Smith*, 6 Oregon, 319, and *Collins v. Smith*, 69 L. T. 305.

(p) *Chapman v. Del. Lack. & West*, R. R., 3 Lansing, 261.

(q) *Gore v. Wright*, 8 A. & E. 121.

(r) *Jones v. Bridgman*, 39 L. T. N. S. 500.

(r') *Pratt v. Richards Jewelry Co.*, 69

Pa. St. 53; see *Martin v. Stearns*, 52 Ia. 345; *Nickells v. Atherstone*, 10 A. & E.

cisive question is whether the landlord accepts or takes possession of the premises, and deals with them in such a manner as indicates that he takes the possession as owner and not for or on account of the tenant, or for the mere protection of the premises against damages from the elements.(s)

§ 793. Acts of ownership done upon the premises are always strong evidence of the true intent of the parties. Where the tenant gave up his key upon the landlord's breach of covenant to repair, and he entered and pulled down the house, this, with other circumstances, was held evidence of an agreement to rescind; and it was queried also as to the implication of a waiver of rent due at the time of entry.(t) So where the tenant left the key at the landlord's counting-house, and he, though at first refusing it, afterwards put up a board "to let" the premises, and used the key to show other parties the premises, and painted out the tenant's name painted in front, it was held that these circumstances amounted to a sufficient surrender.(u) And in many of the cases cited the *collection of rent* from another than the lessee has been considered an important circumstance, though not of itself conclusive, being, as has been said, only accepting the payment of rent through the hand of another.(v) Said Gibbs, C. J.,(w) "as the landlord in general was willing to receive payment from the person who offered it, whosoever he was, he did not by receiving it discharge the lessee."

The *abandonment of the premises* by the tenant is held to be evidence of a surrender to be left to the jury.(x) The lessor may stand upon the contract of lease and recover the whole rent; and in such case may take possession and re-rent the premises, and credit the proceeds upon the first lease. He has his option which course to

N. S. 944; *More v. McCarthy*, 6 Thom. & Cook, 451.

(s) *Reeve v. Bird*, *supra*.

(t) *Furnivall v. Grove*, 8 C. B. N. S. 512; *Grimman v. Legge*, 8 B. & C. 326; *Cline v. Black*, 4 McCord, 431.

(u) *Phené v. Popplewell*, 12 C. B. N. S. 343; *Stotesbury v. Vail*, 2 Beas. Ch. 390; *Amory v. Kannoisky*, 117 Mass. 351; see *Collins v. Smith*, 69 L. T. 305; *Oast-*

ler v. Henderson, L. R. 2 Q. B. Div. 575.

(v) *Kinsey v. Minnick*, 43 Md. 121; *Beall v. White*, 94 U. S. 382; *Durand v. Curtis*, 57 N. Y. 15; see *Dewey v. Dupuy*, 2 W. & S. 556.

(w) *Copeland v. Watts*, 1 Stark. 76.

(x) *McKinney v. Reader*, 7 Watts, 123; and see *Pindar v. Ainsley*, cited in *Belfour v. Weston*, 1 T. R. 312.

take.(y) But if the lessor intends to relet the premises for the account of his former tenant he should notify him accordingly, otherwise he may be considered as having abandoned all claims under the old lease.(z) It was indeed held in *Dodd v. Acklom*,(a) that the acceptance of the key delivered up with intent that the landlord should resume possession would be of itself sufficient. This case, however, may be regarded as practically though not explicitly overruled by the later cases cited above; and the cases on which it relies have been distinguished as involving also an express rescission of the contract.(b)

§ 794. It may also be noted that in an action against a surety on a lease, it is not competent for the defendant to show a verbal agreement contemporaneous with making the lease that it might be surrendered at the will of the tenant, and that such surrender should discharge the surety and remit three months' prior rent; although a surrender by the tenant and acceptance by the landlord of the leased premises would operate as a release to the surety of all subsequently accruing rents.(c) Nor will the reletting of the premises by direction of the surety for his account and benefit after the lessee has abandoned them, operate to discharge the surety from further liability;(d) the rule being, as respects the lessee, that the surrender of a term does not operate to discharge him from the rent already due and payable.(e) So also the surrender of a lease by mutual agreement does not extinguish the tenant's right to recover the amount of rent paid in advance less the rental for time actually occupied.(f)

Effect of
surrender on
surety for
rent.

(y) *Meyer v. Smith*, 33 Ark. 627; *Schisler v. Ames*, 16 Ala. 73; *Marseilles v. Kerr*, 6 Wharton, 500; *McKinney v. Reader*, 7 Watts, 123.

(z) *Hall v. Burgess*, 5 B. & C. 332; *Walls v. Atcheson*, 11 Moore, 379, S. C. 3 Bing. 462.

(a) 6 M. & G. 679, commented on in *Capnan v. Hartley*, 9 C. B. 634; the reporter of which case adds a note showing that *Dodd v. Acklom* being *assumpsit* for use and occupation for a term during which with the plaintiff's assent the occupation had ceased, it was not in fact necessary to show a surrender to support the defendant's plea. See *Natchbolt v. Porter*, 2 Vern. 112, in

which case the lease was also delivered up.

(b) *Withers v. Larrabee*, 48 Me. 570; *Prentiss v. Warne*, 10 Mo. 601; *Matthews v. Tobener*, 39 Mo. 115. See, however, *Thomas v. Sanford Co.*, 71 Me. 549; *Dos Santos v. Hollinshead*, 4 Phila. 57; *Oastler v. Henderson*, 2 Q. B. D. 575; *Smith v. Wheeler*, 18 Alb. L. J. 477.

(c) *Brady v. Peiper*, 1 Hilton, N. Y. 61.

(d) *McKensie v. Farrell*, 4 Bosw. 209.

(e) *Sperry v. Miller*, 4 Seld. 336; *Ogden v. Sanderson*, 3 E. D. Smith, 169; *Barlow v. Wainwright*, 22 Vt. 88; see *Dougherty v. Matthews*, 35 Mo. 520.

(f) *Rewey v. Riley*, 17 N. Y. Week. Dig. 573.

CHAPTER XXXV.

LEASES.

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| <p>§ 795. The first and second sections of the statute requiring leases to be in writing.</p> <p>§ 796. The corresponding sections of the American statutes compared.</p> <p>§ 797. The Irish, Scotch, and Canadian law.</p> <p>§ 798. Distinctions of phraseology of the section in some States. Parol agreements to reduce rents, &c.</p> <p>§ 799. Leases made by an agent.</p> <p>§ 800. Oral agreements to extend leases; oral leases from year to year, and effect of option to be exercised by one party.</p> <p>§ 801. Letting on shares; mining rights, &c.</p> <p>§ 802. Leases for any period need not be by deed. <i>Mayberry v. Johnson</i>.</p> <p>§ 803. Leases under seal need not be signed. Conflict of authority.</p> <p>§ 804. Effect of verbal leases for a time greater than allowed by statute. Tenancy from year to year.</p> <p>§ 805. Rule in Massachusetts, Maine, and Missouri.</p> <p>§ 806. Rule where the statute declares the lease void. Distinction between parol executory leases and those where possession is taken.</p> <p>§ 807. Tenancy from year to year under a lease avoided by the statute is gov-</p> | <p>erned by the terms of the lease. <i>Doe dem. Bigge v. Bell</i>.</p> <p>§ 808. Part performance and other equitable principles.</p> <p>§ 809. Certain leases creating tenancy from year to year.</p> <p>§ 810. Verbal lease for a time certain expires at the end thereof without notice.</p> <p>§ 811. Assignability and other qualities of the yearly tenancy under the Statute of Frauds.</p> <p>§ 812. Provision that rent reserved must amount to at least two-thirds of the value of the thing demised.</p> <p>§ 813. The "three years" date from the making of the lease under the English statute.</p> <p>§ 814. The American statutes. Effect of the omission of the words "from the making thereof."</p> <p>§ 815. Effect of section requiring contracts not to be performed in one year to be in writing, on verbal leases.</p> <p>§ 816. Action for use and occupation where lease is avoided by the statute.</p> <p>§ 817. Computation of duration of leases. Conflicting authorities.</p> <p>§ 818. Leases and agreements for lease. Distinction.</p> <p>§ 819. Effect of statute of 8 & 9 Vict. c. 106, s. 3, on agreements for lease.</p> |
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§ 795. THE first section of the Statute of Frauds provides that all "leases, estates, interests, of Freehold or Terms of years, or any uncertain interest of, into, or out of any

The first and second sec-

messuages, mannours, lands, tenements, or hereditaments made or created by livery and seisin only or by parol and not putt in writeing and signed by the parties soe making or creating the same, or their agents thereunto lawfully authorized by writeing, shall have the force and effect of Leases or Estates at Will onely, and shall not, either in Law or Equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such Parol Leases or Estates or any former law or usage to the contrary notwithstanding." While the second section provides, "Except neverthesse all leases not exceeding the terme of three yeares from the making thereof, whereupon the Rent reserved to the Landlord during such terme shall amount unto two-thirds parts at the least of the full improved value of the thing demised."

tions of the statute requiring leases to be in writing.

Previously to the passage of the Statute of Frauds terms of years of any duration might have been created by parol,^(a) and it was as much against this as the creation of freehold estates by livery and seisin only, that this section of the statute was directed. From the sweeping provisions of the first section, the second excepts only leases for three yeares or less whereupon the rent reserved during the term should equal two-thirds of the full improved value of the thing demised, Parliament evidently being of the opinion that such a short lease at such a high rent would not be a sufficient inducement for men to commit perjury, against which the act itself was aimed. As we shall see, these two sections have been literally or even substantially re-enacted in only a few States, the majority of our American Commonwealths preferring to reduce the exception in favor of short leases to those for a term not longer than *one* year instead of *three*; while nearly all have refused to add the additional requirement as to the amount of rent to be reserved.

§ 796. The excepted term, at least, is limited to one year in the following States and Territories: Arizona,^(b) Alabama, ^{The corre-} (c) California,^(d) Colorado,^(e) Dakota,^(f) Delaware,^(g) sponding

(a) *Maldon's Case*, Cro. Eliz. 33; Moore, K. B. 8, pl. 31.

(b) *Compiled Laws*, 1877, c. XXXIII.

(c) *Rev. Code*, 1876, § 2121, 5.

(d) *Civil Code*, 1872, § 1091. *Code of Civil Procedure*, § 1971.

(e) *Act Oct. 31st*, 1861.

(f) *Rev. Civil Code*, 1877, § 622.

(g) *Rev. Code*, 1852, c. 120, § 3.

sections of the American statutes compared. Idaho,(h) Illinois,(i) Iowa,(j) Kansas,(k) Kentucky,(l) Michigan,(m) Minnesota,(n) Mississippi,(o) Montana,(p) Nebraska,(q) Nevada,(r) New York,(s) Oregon,(t) Rhode Island,(u) Texas,(v) Utah,(w) Virginia,(x) West Virginia,(y) Wisconsin,(z) and Wyoming.(a)

In Connecticut there is the additional provision that the parol agreement must be followed up by actual occupancy of the leased premises by the lessee or some one claiming under him.(b) In Florida the exception is in favor of leases for not more than two years,(c) while in Indiana,(d) North Carolina,(d') and Tennessee(e) the term is increased to three years. In New Jersey(f)

- (h) Act Jan. 21st, 1864.
 (i) Rev. Statutes, 1833, c. 59, § 2. See Bull v. Griswold, 19 Ill. 632.
 (j) McClain's Annotated Digest, 1880, § 3664. Sobey v. Brisbee, 20 Iowa, 106.
 (k) Compiled Laws, 1879, § 2663.
 (l) General Statutes, 1881, c. 22, §§ 1-6; Ragsdale v. Lander, 80 Ky. 61. From Jan. 1st, 1797, to July 11th, 1852, the exception was five years.
 (m) Public Statutes, 1882, c. 120. Coan v. Mole, 39 Mich. 454; Tillman v. Fuller, 13 Mich. 113; Campan v. Laferty, 43 Mich. 429.
 (n) Rev. Statutes, 1866, c. 41, tit. 2, § 10. By § 8 of c. 35. Comp. Stat. 398, an instrument purporting to be a conveyance of any interest or estate in land must be executed in the presence of two witnesses and subscribed by them. But by § 30, the term conveyance is defined to embrace every instrument in writing by which any estate or interest in real estate is created—except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands. See General Statutes, c. 41, § 22, c. 40, § 7; Chandler v. Kent, 8 Minn. 524.
 (o) Rev. Code, 1880, § 2892; Phipps v. Ingraham, 41 Miss. 256.
 (p) Rev. Stat. 1875, Fifth Division, § 160.
 (q) Compiled Statutes, 1881, c. 32, § 3.
 (r) Comp. Laws, 1873, Act Nov. 5th, 1861, § 55.
 (s) Rev. Statutes, 1830, Pt. II., c. 7, tit. 1, § 6; Geiger v. Braun, 6 Daly, 506.
 (t) Civil Code, c. 8, tit. VIII., § 771.
 (u) Public Statutes, 1882, title XXII., chap. 173.
 (v) Rev. Statutes, 1879, tit. XLVI., art. 2464, 4.
 (w) Comp. Laws, tit. XV., Act Feb. 18th, 1876, (§ 1010).
 (x) Munford Code, 1873, c. CXL., § 1.
 (y) Rev. Statutes, 1879, c. 95, § 1.
 (z) Rev. Statutes, 1878, tit. 22, c. CIV.
 (a) Comp. Laws, 1876, c. 57, § 1.
 (b) Rev. Stat. 1875, tit. 19, c. 12, § 40.
 (c) McClellan's Dig. 1881, c. 32, § 1. In force Nov. 15th, 1828; Tunno v. Roberts, 16 Fla. 745.
 (d) Rev. Statutes, 1881, § 404. Marley v. Noblet, 42 Ind. 86. As to § 4925 requiring a seal, see American Ins. Co. v. Avery, 60 Ind. 566.
 (d') Battle's Revisal, 1873, ch. 64, § 2, as to construction of which see Wade v. Newbern, 77 N. Car. 460.
 (e) Comp. Laws, 1871, Act 1801, chap. 25, § 1758; Shepherd v. Cummings, 1 Cold. 354; Thomas v. Blackmore, 5 Yerg. 113; Compiled Laws, 1871, Act 1841-2, chap. 12, § 2202. And the lease must be proved and registered to be valid against third parties.
 (f) Revision of 1877, page 444.

and Pennsylvania(*g*) the qualification of the English statute "from the making thereof," has been added to the three years limitation. The English statute was re-enacted in but few States: Georgia,^(h) Maryland,⁽ⁱ⁾ South Carolina,^(j) Massachusetts,^(k) Michigan,^(l) Missouri,^(m) New Jersey,⁽ⁿ⁾ Vermont.^(o) There is no exception whatever made in the statute of Ohio.^(p) In Arkansas a lease by parol has the force and effect of lease at will only, and "shall not either in law or equity be deemed or taken to have any greater effect or force than a lease not exceeding the term of one year."^(q)

In the following States all leases by parol create only an estate at will, but are not declared void: Maine,^(r) Massachusetts,^(s) Missouri,^(t) New Hampshire,^(u) Vermont.^(w) In Louisiana leases may be made either by written or verbal contract,^(x) while the transfer of *title* of immovable property must be reduced to writing, and no parol evidence thereof is admissible.^(y)

§ 797. In Ireland the Statute of Frauds was re-enacted by statute of 7 Wm. III. c. 12. The Landlord and Tenant Law Amendment Act Ireland, 23 and 24 Vict. c. 154, 13 Rev. Stat. 959, provided by Glossary in § 1: ^{The Irish, Scotch, and Canadian law.} "The word 'lands' shall include houses, messuages, and tenements of every tenure, whether corporeal or incorporeal. § 3. The relation of landlord and tenant shall be deemed to be

(*g*) Brightly's Purdon (ed. of 1872), page 723, act March 21st, 1772, § 1.

(*h*) Act Feb. 25th, 1784; see Appendix Revision of 1882, § 1950, and Steinger v. Williams, 63 Ga. 475.

(*i*) Kilty, p. 242, Alexander's British Statutes in force in Maryland, p. 508.

(*j*) Rev. Statutes, 1872, c. 93, § 5, c. 98, §§ 1-4.

(*k*) In force until April 1st, 1863; see Public Statutes, 1882.

(*l*) In force until Revision of Aug. 1st, 1838.

(*m*) In force until Revision of March 15th, 1845.

(*n*) In force until Revision of Jan. 1st, 1875.

(*o*) Act Mch. 6th, 1797, and Nov. 2d, 1818, until Revision July 1st, 1840.

(*p*) Rev. Statutes, 1880, § 4198.

(*q*) Gantt's Dig. 1874, c. 72, § 2960.

(*r*) Rev. Statutes, 1871, c. 73, § 10; Thomas v. Sanford Steamship Co., 71 Me. 548.

(*s*) Public Statutes, 1882, c. 120, § 2.

(*t*) Revision of 1879, § 2509.

(*u*) General Laws, 1878, c. 135, § 12; Davis v. Brocklebank, 9 N. H. 73.

(*w*) Rev. Statutes, 1880, § 1932.

(*x*) Rev. Statutes, 1876, § 2164, cc. 2683, 2653. In force in 1824; repealed March 29th, 1865; re-enacted Act 1866, page 14; Brown v. Martin, 9 La. Ann. 504.

(*y*) Code 372, art. 241. Rachel v. Pearsall, 8 Mart. La. 702; see Herbert v. Anderson, 2 Menzies (Cape Good Hope), 39, holding that a lease of an urban tenement even for a year is good by parol as against a later written lease if there is possession given.

founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent. § 4. Every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord or his agent thereunto lawfully authorized in writing." It was held in *Bailey v. Marquis of Conyngham* (z) that this constituted an implied repeal of the second section of the statute, and that therefore an agreement by parol to let a fishery for a year was binding, though an incorporeal hereditament. In Scotland a lease of a heritage for more than a year must be proved by writ (or writing). (a) In Canada a partition or exchange of any land and a lease required by law to be in writing of any land and an assignment of a chattel interest in any land, and a surrender in writing of any land not being an interest which might by law have been created without writing, shall be void at law unless made by deed. (b)

§ 798. It should be observed that by the peculiar wording of the statutes of some States the contract or lease is not required to be in writing, but it can only be *proved* by writing. Thus in Iowa it is provided (c) "that the above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless the contract is sought to be enforced or damages to be recovered for the breach thereof, against some person other than him who made it." (d) And

Distinctions of phraseology of the section in some States; parol agreement to reduce rent, &c.

(z) 8 Ir. Jur. N. S. 213.

(a) *Stewart v. Phillips*, 9 Court of Sessions, 501 (4th Series). The right of shooting over a certain tract is of this heritable character.

(b) C. S. U. C. c. 90, § 4; 32 Vict. c. 33, § 2; Rev. Stat. 1877 (Ontario), chap. 98, § 4. See *Hurley v. M'Donnell*, 11 U. C. Q. B. 208; *Lewis v. Brooks*, 8 U. C. Q. B. 576.

(c) McClain's Annotated Digest, § 3666.

(d) *Nordyke & Co. v. Woolen Mills Co.*, 5 N. W. Rep. 693; compare Penna. Act, Br. Pur. 723, providing that trusts in lands shall be *manifested* by writing. Where a parol agreement was made for a lease upon the terms and conditions contained in a certain written lease of the same premises then expiring, it was

in other States parol leases may be good as between the parties, but to be effectual generally, must be in writing or even recorded in the same manner as deeds of land.(e) It has been held, also, that a parol agreement for a reduction of rent endorsed upon a sealed leased and signed by the lessor is inadmissible in evidence, though supported by proof that several months' rent at the reduced rate had been accepted by the lessor.(f)

§ 799. In conformity with the general spirit and intent of the statute, the authority of an agent must be manifested by writing.(g) Though in some States the statute merely provides that the agent must be "lawfully authorized," as in the fourth and seventeenth sections of the English statute. In such cases leases made under parol authority are good.(h) This subject will be found fully discussed in chapter XXV., to which it is only necessary to refer.

§ 800. A collateral agreement annexed to a valid parol lease by virtue of which the term may be extended at the pleasure of the lessee over the statutory period, is void as being in contravention of this section of the Statute of

Leases made
by an agent.

Oral agree-
ments to ex-
tend leases;

held in an action by the landlord for rent that the lease could not be read in evidence without a stamp; *Turner v. Power*, 7 B. & C. 625; 5 M. & W. 131.

(e) Connecticut Gen. Statutes, tit. 18, ch. 6, § 14. The statute merely says such leases (above the term of one year) shall be effectual only against lessor unless in writing and executed, attested, acknowledged and recorded. A lease for ten years in writing but not witnessed, acknowledged, and recorded, was held effectual against the lessee; the object of the act being only to invalidate such a lease as to third parties. *Johnson v. Phoenix Mutual Ins. Co.*, 46 Conn. 92. The Statute of Frauds does not enlarge the powers of any one not *vis juris* to make a lease or other conveyance of an interest in land; *Keller v. Klover*, 3 Col. 135. In Tennessee leases more than three years to be valid against others than lessor, those claiming under him and those affected by

actual notice must be proved and registered; *Compiled Laws*, 1871, § 2202.

(f) *Loach v. Farnum*, 90 Ill. 368. See *Macarty v. Lepaullard*, 4 Rob. La. 425. A tenant may, however, bind himself by parol to pay rent in advance; *Galbraith v. Fortune*, 10 U. C. C. P. 109. Although in the course of an arbitration the defendant admitted he had agreed to grant a lease, he will not be bound by the award of the arbitrators if he still insists upon the bar of the statute; *Walters v. Morgan*, 2 Cox, Ch. Cases, 369; *Peabody v. Rice*, 113 Mass. 33. See chapter XXIII.

(g) See *Lewis v. Bradford*, 10 Watts, 74; *McDowell v. Simpson*, 3 Watts, 129.

(h) *Johnson v. Somers*, 1 Humph. 269; *Lake v. Campbell*, 18 Ill. 106. This might seem to offer a ready means of evading the statute, if any evasion of it were desired. See, as to a parol acknowledgment by the principal of a proposal in writing for a lease made to his

oral leases from year to year, and effect of option to be exercised by one party. Frauds.(i) Such a lease, if the option is indefinite, would be virtually a lease for the life of the lessee, but determinable at his pleasure.(k) But although the option thus given is void, yet if the lessee in the exercise of his election holds over he becomes a tenant from year to year.(l) In the case of a parol demise to hold from year to year, *et sic ultra quamdiu ambabus partibus placeret*, it was held that the third year, if the lease so continued, was not in the nature of a distinct interest, because it arose from the same executory contract, and therefore the lessor may distrain, and such an executory contract as this is not void by the Statute of Frauds, though it be for more than three years, because there is no term for above two years ever subsisting at the same time, and there can be no fraud to a purchaser, for the utmost interest that there can be to bind him can be only one year.(m)

An oral lease for a term of three years, with a right of the lessor to terminate it any time upon four months' notice, is void under the General Statutes of Minnesota,(n) as being for a term "exceeding one year." "It is liable to be defeated by something in the nature of a condition subsequent, to wit, an affirmative act on the part of the lessor. Until this act is done it is in form a lease for three years and therefore void."(o) In a recent English case(p) the exception to

agent, *Callaghan v. Pepper*, 2 Ir. Eq. 399 (in Irish Equity Exchequer); *Gay v. Ihm*, 3 Mo. App. 588 (not reported in full).

(i) *Schmits v. Lauferty*, 29 Ind. 400; see *Nash v. Berkmeir*, 83 Ind. 536.

(k) *Sweetser v. McKenney*, 65 Me. 225; *Hurd v. Cushing*, 7 Pick. 169.

(l) *Coan v. Mole*, 39 Mich. 454; *Dorr v. Barney*, 12 Hun, 259; compare *Insurance & Law Building Co. v. Nat. Bank of Mo.*, 5 Mo. App. 333.

(m) *Legg v. Strudwick*, 2 Salk. 414. See *Birch v. Wright*, 1 T. R. 380, for cases apparently *contra*, but distinguished. In *Pugaley v. Aiken*, 1 Kern. 494, following *Legg v. Strudwick*, 2 Salk. 414, the lease was "for the term of one year and an indefinite period thereafter."

(n) Gen. Stat. 1878, c. 41, § 1.

(o) *Berry, J., in Evans v. Winona Lumber Co.*, 30 Minn. 515. For effect of a parol agreement to abide by the terms of a certain written lease by the same lessor to a different lessee; see *Turner v. Power*, 7 B. & C. 625; *post*, § 798, note. A lease dated February 3d, 1883, of four rooms, possession of two to be had immediately, and of the other two on May 1st, the term to continue till May 1st, 1884, is for a term of over a year, and the agent's authority must be in writing; *Judd v. Arnold*, 18 Nor. W. Rep. 151, Sup. Court of Minnesota, Gilfillan, C. J.

(p) *Ex parte Voisey, in re Knight*, 21 Ch. Div. 442.

the prohibition contained in the first section received a further illustration. In 1875 a mortgage was made to a building society to secure the payment of loans, interest, &c., on default of payment of which the mortgagor should become the tenant of the mortgagees from month to month, at a monthly rent equal to the amount of interest and fines under the rules. In 1881 the mortgagor became bankrupt and made default. As the mortgage had not been executed by the mortgagees, who now became the landlords, it was argued that because the tenancy did not commence until six years after the making of the mortgage, the tenancy was only at will, was terminated by the bankruptcy, and that therefore the distress thereafter levied was illegal. Said Brett, L. J., in giving judgment: "This is not a case of tenancy within the Statute of Frauds at all. The first section of the statute applies only where the tenancy, if good, must of necessity last for more than three years. But if at the time of the arrangement the tenancy may last for less than three years, although it may last for more, it is not within the section of the statute at all. * * This is in terms a tenancy from month to month."(q)

In another recent English case,(r) a lease not under seal but in writing, for an original term of less than three years, which gave an option to the lessee on a month's notice to extend the term for three and a half years more, was held invalid under the Statute of 8 & 9 Vict. requiring leases for more than three years to be by deed. Said Cleasby, B., in delivering judgment: "A lease not exceeding three years must be a lease not giving a right (independent of the lessor) exceeding three years. * * * If the notice is given the tenant still holds under the original demise—there is no further act of the lessor."(s)

(q) 21 Ch. Div. p. 459.

(r) *Hand v. Hall*, 2 Ex. Div. 318.

(s) "The leases meant to be vacated by the first section must be understood as leases of the same kind with those in the second, but which conveyed a *larger interest* to the party than for a term of three years." Lord Ellenborough in *Crosby v. Wadsworth*, 6 East, 610. Compare *Beller v. Robinson*, 50 Mich. 264, where a lease for a year gave an option to extend for three years if

notice in writing were given thirty days before its expiration. It was held that the estate terminated at the end of the year *unless* the notice was given, and the additional estate could not be created by oral agreement or waiver of the stipulation, even if the tenant held over, *Delaashman v. Berry*, 20 Mich. 292, being distinguished, as in that case the option did not have to be in writing.

§ 801. The occupation and cultivation of land "on shares," as it is styled, is within the Statute of Frauds, and a parol letting on shares will therefore only support a holding from year to year.^(t) It was indeed urged in New York^(u) that letting on shares did not create a tenancy at all, but was merely a mode of hiring or contract for labor. It was held, however, the portion of the produce raised upon the land and payable to the owner had precisely the effect of a rent reserved, and that a tenancy was therefore created.^(v)

It is a general principle that a demise of an incorporeal hereditament must be by deed.^(w) And it has always been held that the Statute of Frauds introduced no change in the law upon this point, but was restricted to its operation on those interests in land as were conveyed by parol or by livery of seisin. It seems, however, to be doubtful how far under the English law a parol lease of tithes was invalid, though it appears to be the better opinion that it was.^(x) But it has been held that the lessee of tithes by a parol lease, though having no direct title in law, is yet entitled in equity.^(y) In Wisconsin it has apparently been held that a parol lease of mining rights, without limit of time expressed, would be valid under the Statute of Frauds as a lease for one year.^(z)

§ 802. By the first and second sections of the Statute of Frauds, all interests in land greater than leases for three years, "made or created by livery and seisin only or by parole, and not put in writing and signed by the parties so making or creating the same," shall merely have the force and effect of estates at will.^(a) In accordance

Leases for any period need not be by deed; *Mayberry v. Johnson*.

^(t) *Coan v. Mole*, 39 Mich. 454; *Morrill v. Mackman*, 24 Mich. 279.

^(u) *Jackson d. Colden v. Brownell*, 1 Johns. 267.

^(v) A grant of liberty to flow land for a number of years is a lease within the recording acts of Connecticut; *Smith v. Simons*, 1 Root, 318.

^(w) See *Bird v. Higginson*, 6 A. & E. 824.

^(x) See, in support of the proposition stated in the text, *Keddington v. Bridgman*, Bunb. 2; *Gardiner v. Williamson*, 2 B. & Ad. 336; *Tenterden, C. J.* For

authorities contra, *Bugg v. Woodward*, Cro. Eliz. 188; *Doe d. Morgan v. Church*, 3 Camp. 71; *Rex v. Fairclough*, 8 Mod. 61.

^(y) *Robinson v. Williamson*, 9 Price, 136.

^(z) *Clegg v. Jones*, 43 Wis. 482.

^(a) For interpretation of the term, "uncertain interests of, in, to, or out of * * * lands," in the first section of the statute, see *Ex parte Voisey, in re Knight*, 21 Ch. Div. 442. Compare *Whittemore v. Gibbs*, 24 N. H. 484.

with the most natural construction of this clause, a lease for any period of time would not necessarily have to be created by deed, and such in fact has been the result of the cases, although, on account of the peculiar wording of other sections as well as this first section of the statute, there are numerous difficulties to be explained. Thus it will be noticed that by the third section, an assignment or surrender of an interest in land must be by *deed or note in writing*, the distinction there being clearly marked.

If it is admitted that under the first section a lease for years may be created by simple writing, it would also seem that a freehold might be created in the same manner, whereas it was evidently the intent of the statute to add additional formalities to the conveyance of interests in land, and not to take away any already existing. This argument undoubtedly is very cogent, and was considered by Hornblower, C. J., in *Mayberry v. Johnson*.^(b) In this case the question was discussed with great ability and learning, in an exhaustive opinion. "At the common law," said the court, "estates in fee for life or for years, with remainder in fee, in tail or for life, might have been created by *deed and livery of seisin* or by *livery of seisin only*; and leases or estates for years might have been made by *deed* or by *parol*, or by *parol* merely, without livery of seisin. * * * A lease for years written but not sealed, was a *parol* lease as well as a lease *unwritten and verbal only*. (Per Lord Ch. Skynner, in *Rann v. Hughes*, 7 T. R. 350; *Perrine v. Cheesman*, 6 Halst. 177; *Ford v. Campfield*, 6 Halst. 332; *Ballard v. Walker*, 3 Johns. Cas. 65.)

"Thus stood the law of conveyancing and of contracts when the 29 Car. 2, cap. 3, was passed. The question then occurs, what change did the statute introduce in the mode of creating and transferring the different interests and estates of freehold and less than freehold mentioned in the statute? The answer is plain: it abolished the practice of creating estates in fee and all other estates of freehold by *livery of seisin only*; and prohibited the making of leases for more than three years by *parol* agreements not put in writing. It did not prescribe the manner in which such estates should be created or transferred, but only declared that freehold estates if made by *livery and seisin only*, and estates for years, if made by *parol* and not put in *writing*, should operate as estates at

(b) 3 Green (N. J.), 116.

will. In whatever way, therefore, such estates might have been created prior to the statute, other than by mere livery of seisin, or by parol and not put in writing, they may still be created. Now it is manifest that before the Statute of Frauds estates of freehold and of inheritance might have been created by *deed* and *livery of seisin*, and that leases might have been made by *writing simply*, or, to speak technically, by a parol agreement reduced to writing. It follows, therefore, that after the Statute of Frauds no estates of freehold could be created or conveyed but by *deed*, and that a lease for more than three years could be made by indenture of lease, or by parol agreement in writing signed by the parties."

Some of the early English cases imply apparently that a lease for more than three years must be under seal. In *Villers v. Handley*, decided in 1757,(c) *Rex v. Inhabitants of Little Dean*,(d) (where the court seem to have considered that a lease must be by deed *ex vi termini*), and a still earlier case decided by Lord Holt in 1699,(e) much may be found to favor that construction of the statute. Lord Mansfield in 1810,(f) and the court in an earlier case,(g) thought that a seal was not necessary to a valid lease. "Hence," it was further said in *Mayberry v. Johnson*, "it was gravely insisted so recently as the year 1815, in *Jackson v. Hart*, 12 Johns. 73, that a writing not under seal was sufficient under the Statute of Frauds to pass a fee simple. This position was not sustained by the court, but they admit that no direct decision appears to have been made on the point." In spite of a remark in a New York case,(h) it is now quite well settled that a sealed instrument is necessary to pass an estate of freehold.(i)

The argument in *Mayberry v. Johnson*(j) furthermore rested upon a large class of cases in which agreements in *writing* for leases signed but not sealed, have been held to amount to leases, "if in words *in presenti*, and if it did not appear upon the whole instrument that the parties intended it should not take effect until a more formal lease should be prepared and executed."(k) The distinction was taken between such "parol demises" and leases

(c) 2 Wils. 49.

(h) *Allen v. Jaquish*, 21 Wend. 628.

(d) 1 Stra. 555 (9 Geo. 1).

(i) *Hill v. Woodman*, 14 Me. 38; see(e) *Rawlins v. Turner*, 1 Ld. Ray. 736.*Sweetser v. McKenney*, 65 Me. 229;(f) *Morgan v. Bissell*, 3 Taunt. 71.*Lake v. Campbell*, 18 Ill. 106.(g) *Farmer v. Rodgers*, 2 Wils. 26, decided two years before *Villers v. Handley*, *supra*.

(j) 3 Green, N. J. 116, at page 120.

(k) 5 Bac. Abr. Gwyll. ed., title *Leases*, K.; *Morgan v. Bissell*, 3 Taunt.

strictly so called under seal.^(l) The distinction, however, would seem to be rather verbal than real, and the application of *parol* to *demise* would be open to the same technical objection as if applied to *lease*.^(m)

§ 803. The decisions are not very numerous upon the question whether under the Statute of Frauds a lease under seal must be signed as well. Lord Denman, C. J., in delivering the opinion of the Court of Queen's Bench in *Cooch v. Goodman*,⁽ⁿ⁾ a case in which the point was raised, said : ^{Leases under seal need not be signed; conflict of authority.} "It is now argued that inasmuch as the previous words (of the statute) are 'made or created by livery and seisin only or by parol,' the distinction apparently intended to be established by the Statute of Frauds was between estates or interests created by a formal instrument, and those created by mere matter *in pais*, which must be established by the fallible recollection of witnesses. Blackstone, in his Commentaries, vol. II., page 306, laid it down that the Statute of Frauds has restored the old Saxon form of *signing*, and superadded it to sealing and delivery in the case of a deed. Mr. Preston, on the other hand, in his edition of Sheppard's Touchstone, page 56, note 24, treats this passage in Blackstone as a mistake, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now, for the first time, have arisen in a court of law, and perhaps as curious that it is not now necessary to determine it." Although the case turned upon another point, yet it is easy to see, from the remarks of the judges reported as having been made during the argument, that the opinion of Mr. Preston was regarded as correct.^(o)

"Sealing," said Rolfe, B., in *Cherry v. Heming*,^(p) "was intro-

65; *Poole v. Bentley*, 12 East, 167; *Baxter v. Brown*, 2 Wm. Bl. 973; *Goodtitle v. Way*, 1 T. R. 735. So, also, to cite a few from a great number, *Doe d. Coore v. Clare*, 2 T. R. 739; *Doe v. Ashburner*, 5 T. R. 163; *Doe v. Smith*, 6 East, 530; *Barry v. Nugent*, 3 Doug. 179, 5 T. R. 165 n.; *Doe d. Walker v. Groves*, 15 East, 244; *Livingston v. Kisselbrack*, 10 Johns. 337.

(l) *Mayberry v. Johnson*, 3 Green, 120-121.

(m) See *Bouvier*, Law Dict. *sub voc.*

(n) 2 Q. B. 580.

(o) In *Soprani v. Skurro*, Yelv. 18, it was held that a lease sealed by the lessee and not by the lessor, was inoperative both as regards the interest and covenants; but this was thought in *Cooch v. Goodman* to be too broadly stated, and indeed is said in *Loughran v. Smith*, 11 Hun, 311, 75 N. Y. 205, to be overruled by that case. *Willes, J.*, however, in *Reuss v. Pickaley*, L. R. 1 Ex. 353, alludes to *Soprani v. Skurro* as authority.

(p) 4 Ex. 636-637.

duced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means that such instruments are not to rest upon parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or mark." This, however, was extrajudicial, as the question was not decided in this case either; and indeed Chitty's note to the passage in Blackstone, before cited, refers to two other early cases as establishing the opposite doctrine.^(g) In a later case, however,^(r) an action of covenant upon an indenture of lease by the lessor, a plea that the indenture was not signed by the plaintiff was held bad on demurrer. The question was discussed and a similar conclusion reached in *Indiana*,^(s) where the validity of an appeal bond, sealed but not signed, was in dispute.^(t) In Ohio a seal appears to be necessary, except perhaps as between the parties, if the lessee has entered and enjoyed the premises.^(u) In Massachusetts it appears that by statute signing is necessary as well as sealing.^(v)

(g) *Ellis v. Smith*, 1 Ves. Jr. 13; *Smith v. Evans*, 1 Wilson, 313.

(r) *Aveline v. Whisson*, 4 M. & G. 81.

(s) *Parke v. Hazlerigg*, 7 Blackf. 536.

(t) The reporter adds the following note: "In cases unaffected by statute it is not essential to the validity of a deed that it have the party's signature; Bac. Abr. Obl. C. 3; Prest. Abst. 61; *Smith on Cont.* 4, 5. Soon after the Statute of Frauds was passed the question was raised in the Common Pleas; three judges held the signature to be unnecessary to a will having a seal, the other doubted; *Lemayne v. Stanley*, 3 Lev. 1. That sealing a will is a signing of it was decided in *Warneford v. Warneford*, 2 Stra. 764. *Willes, C. J.*, expressed a decided opinion the other way in *Ellis v. Ellis*, 1 Ves. Jr. 13. The judges in *Smith v. Evans* say that what was said in 3 Lev. 1, 'that putting a

seal to a will is a sufficient signing within the Statute of Frauds' is a very 'strange doctrine'; 1 Wils. 313. In *Indiana* conveyances of land or of any estate or interest therein are expressly required to be subscribed and sealed; R. S. 1843, p. 416;" see *Earl of Aboyne v. Ogg, Hume*, 847.

(u) *Taylor v. Bailey, Wright, Ohio*, 646; see *Pitman v. Woodbury*, 3 W. H. & G. 12.

(v) *Hutchins v. Byrnes*, 9 Gray, 367. See for other cases bearing on the point, *Roff v. Duance*, 27 Cal. 565; *Lake v. Campbell*, 18 Ill. 106; *Allen v. Lambdin*, 2 Md. 279; *Clemens v. Broomfield*, 19 Mo. 118; *Fittou v. Hamilton City*, 6 Nevada, 196; *Union Bridge Co. v. Troy and Lansingburgh R. R.*, 7 Lansing, 240; *Wade v. Newbern*, 77 N. Car. 460; *Cavanagh's Modern Conveyancing*, 71, 72. It is of no moment, under 7 &

§ 804. In some States, it will be observed, it is declared that no *action* shall be maintained upon a parol lease which exceeds the statutory limitation; in others the lease itself is declared void; in others again the English statute being followed, the lessee becomes expressly a tenant at will. But the practical effect of all the statutes is that a parol lease for a term greater than that specified is held to be inoperative, and on possession being taken, a tenancy at will (ripening into a tenancy from year to year, and only terminable by legal notice) is held to be constituted.^(w) The statute has been interpreted strictly upon this point, and is held to be satisfied by holding that a parol demise for more than three years creates an estate at will merely; but this estate when once so created may be changed into a tenancy from year to year by payment of rent or any other acts of the parties equally conclusive of their intention to enlarge the estate. It is this new agreement, founded upon the tenancy at will created by the former lease, which gives rise to the yearly tenancy.

Effect of verbal leases for a time greater than allowed by statute; tenancy from year to year.

Indeed it is probable, as pointed out in the notes to *Clayton v. Blakey*,^(x) that this is all that was in the first instance decided by that case, for although it is not definitely stated in the report that such payment was made (from which the new agreement might be legally inferred), yet taking all the facts stated into consideration, it is more than probable that payment of rent had been actually made under the void lease.

The mere lease by parol for more than three years will not therefore, without more, render the lessee a tenant from year to

8 Vict. and 8 & 9 Vict., whether the lessor or lessee signs first; *Reuss v. Pickaley*, L. R. 1 Ex. 353.

(w) *Clayton v. Blakey*, 8 T. R. 3; 2 Smith, Lead. Cases; *Denn d. Warren v. Fearnside*, 1 Wils. 176; *White v. Nelson*, 10 U. C. C. P. 158; *Gibboney v. Gibboney*, 36 U. C. Q. B. 236; *Warner v. Hale*, 65 Ill. 395; *Nash v. Berkmeir*, 83 Ind. 536 (see *Schmitz v. Lauferty*, 29 Ind. 400); *Moorehead v. Watkyns*, 5 B. Mon. 228; *Gudgell v. Duvall*, 4 J. J. Marsh. 230; *Morrill v. Mackman*, 24 Mich. 279; *Coan v. Mole*, 39 Mich. 454;

Murray v. Armstrong, 11 Mo. 213; *Finney v. St. Louis*, 39 Mo. 177; *Evans v. Winona Lumber Co.*, 30 Minn. 515; *Friedhoff v. Smith*, 13 Neb. 5; *Innot v. Pendergast*, Sel. Cases Newfoundland, 395; *Dorr v. Barney*, 12 Hun, 259; *Thomas v. Nelson*, 69 N. Y. 118; *Craske v. Publish. Co.*, 17 Hun, 319; *Garrett v. Clark*, 5 Oreg. 464; *Williams v. Ackerman*, 8 Oreg. 405; *Hammond v. Dean*, 8 Baxter, 193; *Barlow v. Wainwright*, 22 Vt. 88.

(x) 2 Smith, Lead. Cases, *180.

year. Entry at least is necessary to produce the change,(y) and indeed the better opinion would seem to be that entry alone is not sufficient. There must be, as has been said, the payment of rent or acknowledgment of the new tenancy, or some act equivalent thereto.(z) And the rule is the same under the more recent statute of 8 & 9 Vict. c. 106, § 3,(a) which requires leases to be by deed.(b)

§ 805. In at least three States, however, namely Massachusetts, Maine, and New Hampshire, the Statute of Frauds has been otherwise construed. The statute as enacted in the former State omitted the exception of the English statute as to leases for less than three years, the language being general that "Estates or interests in lands created or conveyed without an instrument in writing signed by the grantor * * * shall have the force and effect of estates at will only." The Supreme Court decided in *Ellis v. Paige*(c) that the English rule as stated above was based upon the exception as to short leases contained in the English statute; and accordingly held that even occupation and

(y) *Cases supra*, and *District v. Moorhead*, 43 Iowa, 486; *Scully v. Murray*, 34 Mo. 420; *Murray v. Armstrong*, 11 Mo. 213; *Moore v. Kelly*, 5 Ont. App. 261; *Gibboney v. Gibboney*, 36 U. C. Q. B. 236; *Jackson v. Rogers*, 2 Cal. Cas. Err. 317; *Taylor v. Bailey*, Wright, Ohio, 646.

(z) *Doidge v. Bowers*, 2 M. & W. 365; *Cox v. Bent*, 5 Bing. 185 (where the tenant in an account stated, admitted as an item thereof a half-year's rent); *Knight v. Bennett*, 3 Bing. 361; *Denn v. Fearnside*, 1 Wils. 176; *Ridgely v. Stillwell*, 28 Mo. 400; *Kerr v. Clark*, 19 Mo. 133. In *Donohoe v. Conrahy*, 2 Jones & Lat. 697, it was said by Sugden, Lord Chancellor, that "a mere continuance in possession by a tenant from year to year, who has contracted by parol for a lease, will not confer a title which can be enforced in this court; in order to enable this court (Chancery) to interfere as against the Statute of Frauds, there must be some damages which the tenant would sus-

tain if the contract be not carried into execution." See *Botsford, J.*, in *Doe d. Parkinson v. Hauptman*, Berton, N. B. 434; *Foot v. Warren*, 10 Ir. Ch. Rep. 1; *Camden v. Batterbury*, 5 C. B. N. S. 808, 896; *Little v. Pallister*, 3 Green, 15; *Hingham v. Sprague*, 15 Pick. 102; *Kelly v. Waite*, 12 Metc. 300; *Leavitt v. Leavitt*, 47 N. H. 335.

(a) 9 Revised Statutes, 969.

(b) *Vincent v. Godson*, 1 Sm. & Gif. 384; 4 De G. M. & G. 546; *Lee v. Smith*, 9 Ex. 662. In Pennsylvania there is said to be no distinction whatever made between an estate at will and a tenancy from year to year. Tenancy at will exists there only in name; *Hey v. McGrath*, 81* Pa. St. 310; *Clark v. Smith*, 25 Pa. St. 137; *Lealey v. Randolph*, 4 Rawle, 123; and compare *McDowell v. Simpson*, 3 Watta, 129, and *Farley v. Stokes*, 1 Pars. Eq. 422.

(c) 1 Pick. 45; see *Hollis v. Pool*, 3 Metc. 351; *Kelly v. Waite*, 12 Metc. 300.

payment of rent by a person entering under a parol lease would not convert him into a tenant from year to year. It is difficult, however, to see how the reasoning of the court applies against the growth of an estate at will created under the statute into a tenancy from year to year, and the case has been criticized quite frequently.(d)

The Massachusetts cases have notwithstanding been followed in Maine,(e) and the rule is similar in New Hampshire.(f) In Missouri, however, the statute is similar to that of Massachusetts, but the general rule has there been followed.(g)

It has been sometimes loosely said, where a lease is made orally for a longer period than is permitted by the exception in the statute, that the lease or contract therefor "is void only for the excess," and valid for the period allowed. In other words, if a lease is made for seven years without writing, where the statute allows a lease for three years only to be thus created, a valid term for the latter period will be created to which both lessor and lessee may be held. Without stopping to expose the fallacy of the argument through which this conclusion is or would be reached, further than to observe that, both parties having signified their intention to be bound and to bind the other for a term of seven years, *non constat* either would have consented to be bound at all for the term of three years on the same conditions, it will be sufficient to say that it is believed that in no case has the doctrine been squarely and necessarily so held.

Upon examination the *dictum* referred to will be found in cases decided in those of the United States where the statute excepts leases for one year, and where possession being taken in accordance with the lease and rent being paid, the usual tenancy from year to year has been developed. The coincidence of the duration of this tenancy with the statutory exception has doubtless occasioned the court to base their decision on too broad a ground, and to disregard what is the true theory of the tenancy from year to year as devel-

(d) Barlow v. Wainwright, 22 Vt. 93; see Larkin v. Avery, 23 Conn. 313, and the dissenting opinion of Putnam, J., in Ellis v. Paige, reported in note to Coffin v. Lunt, 2 Pick. 70.

(e) Davis v. Thompson, 13 Me. 209 (4 Shepley); Withers v. Larrabee, 48 Me. 570.

(f) Whitney v. Swett, 2 Foster, 10 (decided in 1850).

(g) Kerr v. Clarke, 19 Mo. 132. The court in this case did not advert to the dissimilarity in the statutes. Hammon v. Douglas, 50 Mo. 434; see 1 Cent. Law Journal, p. 533.

oped from the tenancy at will. Thus in Nebraska,^(h) a parol lease was made for a period of two years. The statute provides in that State that every contract for a lease for a longer period than one year shall be *void* unless the contract, &c., be in writing and signed by the party by whom the lease is to be made. The court said "a parol contract for the leasing of land for a longer period than one year is void ; that is, there is no authority to make the lease ; but a verbal lease for one year is valid, and if the tenant enters into possession" (as in this case) "under a lease void by the statute because not in writing, and is to pay rent at stated periods within the statute, the lease may be valid for the length of time the parties had authority to enter into the contract. Here was a lease for twenty-four months, under which the tenant took possession. The parties had authority to make a lease for twelve months ; and it is only the excess that is void ; and it is void only because of the limitation upon the power to make the contract, but to the extent of the authority the lease is valid. The lease, therefore, was valid for one year."

So in Tennessee,⁽ⁱ⁾ where a verbal lease was made for three years, the statutory limit for leases not in writing being one year merely, the court said : "This contract was void under the Statute of Frauds (Code, § 1758), but good for one year." As possession had been taken and rent paid under the lease, the case did not warrant that statement of the law. Indeed, as was well said in New York,^(j) it is difficult to perceive how such a contract declared to be void by the statute can be held to be valid for a single hour, or upon what principle a tenant entering under a void lease could be compelled *by virtue of the lease* to pay for a longer period than he actually occupied.^(k)

§ 806. With more reason it might have been supposed where the statute, instead of giving the tenant by parol the status of a tenant at will, expressly declares that the lease shall be *void*, that then no rights whatever should pass under it. The Supreme Court of Wisconsin,^(l) under

Rule where
the statute
declares the
lease *void* ;
distinction
between

(h) *Friedhoff v. Smith*, 13 Neb. 5.

Mon. 247; *Gudgell v. Duvall*, 4 J. J.

(i) *Hammond v. Dean*, 8 Baxter, Tenn. 195.

Marsh. 230; *Morehead v. Watkyns*, 5 B. Mon. 228.

(j) *Thomas v. Nelson*, 69 N. Y. 120.

(l) *Kopplitz v. Gustavus*, 48 Wis. 48.

(k) See also *Roberts v. Tennell*, 3 T. B.

such provisions of the Wisconsin statute, has held that the lessee is yet a tenant at will under the statute; the distinction, however, being carefully noted between parol executory leases and those where possession is taken, &c. taken and rent paid according to the terms of the lease. The court relied in part upon *Lee v. Smith*,^(m) decided under the statute 8 & 9 Vict. c. 106, which is similar in its terms.⁽ⁿ⁾ And this rule may be considered as fully settled by the authorities, although it is sometimes followed with reluctance.^(o) And we may here add that the cases consider the effect of entry under a void lease and of holding over after the expiration of the valid one as identical.^(p)

§ 807. The tenancy from year to year, however, being once established according to the principles above stated, it may be laid down as a general rule that the terms of the lease void for non-compliance with the statute will, nevertheless, govern the tenancy collateral to it, in so far as such terms are applicable to that species of tenancy. In the leading case *Doe d. Rigge v. Bell*,^(q) it was held that if by the terms of a parol lease for seven years the tenant was to enter at Lady-day and quit at Candlemas, the landlord could only put an end to the tenancy at Candlemas. Although the rule is stated in this case by Lord Kenyon as one of law, yet the more recent cases have held that the existence of the tenancy as well as its terms are really questions for the jury, and that the law does not absolutely infer any particular contract from the terms of the void lease.^(r) The acquiescence of the tenant in the terms of the void lease as shown by his payment of rent according to it gives rise to a presumption, conclusive only in the absence of rebutting evidence, that the parties intend such terms to govern them in the new relation in which they are placed.^(s)

(m) 9 Exch. 662.

(n) Citing also *Lockwood v. Lockwood*, 22 Conn. 425; *Larkin v. Avery*, 23 Conn. 304; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 Cow. 226; *Prindle v. Anderson*, 19 Wend. 391; *Lounsbery v. Snyder*, 31 N. Y. 514; and *Grant v. Ramsey*, 7 Ohio St. 157; and treating these authorities as conclusive.

(o) *Evans v. Winona Lumber Co.*, 30

Minn. 515; see *Friedhoff v. Smith*, 13 Neb. 5.

(p) See *Witt v. Mayor*, 6 Robert. 441; *Hart v. Finney*, 1 Strob. 250.

(q) 5 T. R. 471; 2 Smith, L. Cas. *177.

(r) *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *Waring v. King*, 8 M. & W. 575; *Chapman v. Towner*, 6 M. & W. 104; *Jones v. Shears*, 4 A. & E. 832; *Nichol v. Williams*, 8 Cow. 15.

(s) *Dorrill v. Stephens*, 4 McCord, 59.

It is important to bear this in mind, as in some cases the contrary doctrine has been asserted without qualification. Thus in Upper Canada(t) it was said that "the tenancy * * * imported into it all the terms contained in the oral agreement for a lease under which the plaintiff entered *that could be agreed upon* and proved orally;" that is, in all respects except the duration of the term.(u) The distinction is more or less clearly recognized in the cases cited in the note below, in which the status of a tenant, entering under a void lease or holding over after the expiration of a valid one, has been considered.(w) It has accordingly been held that if a tenant, whose lease has expired, is permitted to continue in possession pending a treaty for a new lease, he is not a tenant from year to year, but so strictly at will that he may be turned

(t) *Broughan v. Balfour*, 3 U. C. C. P. 72.

(u) And in case the lease is in writing though void, because under the provisions of some statutes unsealed, the writing may be offered in evidence; *Crommelin v. Theiss*, 31 Ala. 412; *Crawford v. Jones*, 54 Ala. 460; *Lee v. Smith*, 9 Ex. 662; *Galbraith v. Fortune*, 10 U. C. C. P. 109; *Lyman v. Snarr*, 10 U. C. C. P. 462. Under the Judicature Acts in England the rule no longer holds that one occupying under an executory agreement for a lease is only made a tenant from year to year by the payment of rent, but he is to be treated in every court as holding upon the terms of the agreement; *Walsh v. Lonsdale*, 21 Ch. Div. 9. Said the court in this case: "There is only one court, and equity rules prevail in it. The tenant holds under an agreement for a lease. He holds therefore under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." This decision has very justly been severely criticized. See article on *Agreements for Leases*, 27 *Solicitors' Jour.* 19.

(w) *Denn d. Warren v. Fearnside*, 1

Wils. 176; *Parker v. Taswell*, 27 L. J. N. S. Ch. 812; *Martin v. Smith*, 43 L. J. Ex. 43; *Berrey v. Lindley*, 3 M. & G. 498; *Torriano v. Young*, 6 C. & P. 8; *Bedford v. Johnson*, 2 Sid. 153; *Arden v. Sullivan*, 14 Q. B. 832; S. C. 19 L. J. Q. B. N. S. 268, *Erle, J.*; *Hanchett v. Whitney*, 2 Aik. 240; *Strong v. Crosby*, 21 Conn. 398; *Lockwood v. Lockwood*, 22 Conn. 425; *Cody v. Quarterman*, 12 Ga. 386; *Railsback v. Walke*, 81 Ind. 409; *Roberts v. Tennell*, 3 T. B. Mon. 251; *Ragsdale v. Lander*, 80 Ky. 61; *Moorehead v. Watkyns*, 5 B. Mon. 228; *Witt v. Mayer*, 6 Robert. 441; *Currie v. Barker*, 2 Gray, 226; *Stoops v. Devlin*, 16 Mo. 162; *Friedhoff v. Smith*, 13 Neb. 5; *Drake v. Newton*, 3 Zab. 112; *Bradley v. Covell*, 4 Cow. 350; *Laughran v. Smith*, 4 N. Y. Wk. Dig. 594; 11 Hun, 311; *Reeder v. Sayre*, 4 N. Y. Wk. Dig. 553; 6 Hun, 563, 70 N. Y. 180; *Schieffelin v. Carpenter*, 15 Wend. 400; *Abeel v. Radcliff*, 13 Johns. 399; *Hey v. McGrath*, 81* Pa. St. 310; *Hart v. Finney*, 1 Strob. 250; *Phillips v. Robertson*, 4 Hayw. 158; *Shepherd v. Cummings*, 1 Cold. 354; *Duke v. Harper*, 6 Yerger, 284; *Barlow v. Wainwright*, 22 Vt. 92; *Corey v. Richards*, 4 West. Law Month. 253.

out of possession without notice.(x) Agreements to repair and to rebuild have thus been held to become incorporated in the tenancy from year to year, although made by parol as part of the void lease.(y) And where a tenant under a written lease holds over after the expiration of his term, a proviso in the lease for re-entry on non-payment of rent is a condition which attaches to the yearly tenancy.(z) A parol demise from year to year will carry a right of way appurtenant to the land, which right of way was described in the deed under which the lessor holds.(a) Thus also a tenant holding over had come in as an under-tenant before any lease was granted at all, and there was no evidence that he knew of it. It was held a question for the jury whether he was an under-tenant or an assignee of the lease.(b)

If any of the stipulations contained in the parol agreement of lease are inconsistent with the tenancy from year to year, then of course they will be held inoperative. A good example of this is found in a recent English case.(c) There the agreement, which was void as a lease under 8 & 9 Vict. c. 106, § 3, contained a stipulation that the tenancy should continue until after two years' notice to quit should be given. It was held that although stipulations as to notice will ordinarily govern the yearly tenancy, in this case they did not; Pollock, C. B., observing that if the argument was well founded, a stipulation that seven years' notice should be given might be equally well implied, and therefore there might be a lease for seven years by parol.

§ 808. The principle is well established that agreements carried into execution on one part, where the acts done are performed with a view to the agreement claimed, are not within the statute.(d) So the surrender of his lease by the lessee, in consideration of the lessor's granting a

Part performance and other equitable principles.

(x) *Doe dem. Hollingsworth v. Stennett*, 2 Esp. 717.

(y) *Halbut v. Forrest City*, 34 Ark. 246.

(z) *Thomas v. Packer*, 1 H. & N. 669, with note by editor of American edition.

(a) *Skull v. Glenister*, 16 C. B. N. S. 91.

(b) *Torriano v. Young*, 6 C. & P. 8.

(c) *Tooker v. Smith*, 1 H. & N. 732.

(d) *Sugden on Vend.* 72; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Crocker v. Higgins*, 7 Conn. 348, and cases cited; *Steininger v. Williams*, 63 Ga. 475; *Steel v. Payne*, 42 Ga. 208; see *Hollis v. Whiteing*, 1 Vern. 150; *Charlewood v. Bedford*, 1 Atk. 497; *Morrison v. Peay*, 21 Ark. 110. See chapters XXIV., XXV., and XXVI., where the subject is discussed.

new lease to a third party, is such an act of part performance as will take the case out of the Statute of Frauds.(e) But execution of a written lease is not an act of part performance.(f) Nor, it seems, will improvements more than compensated for by the use of the land for many years, operate as part performance.(g) And if it is inconsistent with justice upon the whole to treat possession and improvements by the lessee as part performance, they will not be so considered.(h) There are other equitable limitations placed upon the literal strictness of the statute. Thus in an early case,(i) a lease had been obtained under an oral agreement that the lessee should give another the benefit of it. The latter having filed a bill to obtain the benefit of the lease, it was held by Lord Chancellor King that the defendant could not plead the Statute of Frauds.(j)

In another case a tenant for life under a limited power of leasing granted a lease in excess of his power, which was void and incapable of ratification by the remainder-man. The remainder-man, however, accepted rent as rent; so it was held after the death of the tenant for life that his lessee was entitled to notice to quit.(k)

It is hardly necessary to add that in cases of fraud the statute does not apply at all.(l) Nor will the statute be held to act retroactively. Thus in Louisiana prior to March 25th, 1865, parol evidence could be introduced to prove a verbal contract of lease. The act of the legislature excluding such evidence, passed on that date, has been held not to apply to contracts previously entered into.(m)

(e) *In re Cooke's Estate*, L. R. 5 Ir. 99.

(f) *Phillips v. Edwards*, 33 Beav. 441.

(g) *Holmes v. Holmes*, 49 Ill. 32.

(h) *Porter v. Gordon*, 5 Yerg. 102. In Iowa part performance of a lease not exceeding one year does not obtain at law, since these leases are expressly excepted from the clauses of the Iowa Statute of Frauds which allow part performance; *Hunt v. Coe*, 15 Iowa, 197; *Creighton v. Sanders*, 89 Ill. 583. By the Scotch law a lease for a term of years may be constituted by a verbal agreement, followed by *rei interventus*, but the verbal agreement can be proved only by writing or oath of the party;

Walker v. Flint, Court of Sessions, 3d Series, 1 M. 417. A lease in writing not signed but containing all the essentials of a lease, followed by possession or such *rei interventus* as to show the agreement has been acted on, will bind the party; *Bell v. Goodall*, 10 Sessions Cas. 4th Series, 905.

(i) *Atkins v. Rowe*, Mosley's Rep. 39.

(j) Compare *Clark v. Waterlow*, 8 C. & P. 365.

(k) *Doe d. Martin v. Watts*, 7 T. R. 83.

(l) *Kirtland v. Schauck*, 61 Barb. 355; *Crouse v. Frothingham*, 27 Hun, 123; *Hosford v. Merwin*, 5 Barb. 51; *Willink v. Vandever*, 1 Barb. 599.

(m) *McDonald v. Stewart*, 18 La.

§ 809. A lease at a yearly rent, payable quarterly, for as long as the lessee kept his rent paid and the lessor had power to let the premises, is too indefinite to confer any particular estate greater than a tenancy from year to year.⁽ⁿ⁾ A parol lease for an indefinite time, with possession under it, has been held a tenancy from year to year,^(o) and not for the general course of husbandry, at least if the latter is not within the period excepted by the statute.^(p) In a late case^(q) a lease at the will and pleasure of the lessor at a fixed yearly rent, payable quarterly, under which the lessee occupied and paid rent for two years, was held not to render the lessee a tenant from year to year. If, however, the rent is by the terms of the void agreement payable monthly and is paid as it accrues, the lessee is a tenant from month to month, and not from year to year,^(r) and consequently entitled to one month's notice to quit.^(s)

Certain leases creating tenancy from year to year.

§ 810. If the parol lease is for a time certain, the tenancy from year to year expires at the end of that time, without further notice to quit, or any other act of either party, although specified notice is required by statute to terminate a tenancy at will.^(t) In a well-considered case in New Brunswick,^(u) a tenant under a parol lease for seven years held over the term, no rent having been paid at all. In an action of ejectment it was held that no notice was necessary. Although Botsford, J., was of the opinion that on account of the non-payment of rent no tenancy from year to year arose from the mere occupation, Parker, J., put his decision on the ground that the stipulation as to the seven years should be taken to operate as a notice to quit at the end of that period, made by both parties at the inception of the tenancy, although that notice *might* have been superseded by another notice to quit at an earlier period.

Verbal lease for a time certain expires at the end thereof without notice.

Ann. 91; see *Nangle v. Smith*, 1 Ir. Eq. R. 119, for an interesting case illustrating the same principle.

(n) *Wood v. Beard*, 35 L. T. 866; *Holmes v. Day*, 8 Ir. Rep. C. L. 235.

(o) *Swan v. Clark*, 80 Ind. 57.

(p) *Roe d. Bree v. Lees*, 2 Wm. Bl. 117.

(q) *Doe d. Basto v. Cox*, 17 L. J. Q. B. 3.

(r) *Brownell v. Welch*, 91 Ill. 523;

Warner v. Hale, 65 Ill. 395; *Wheeler v. Frankenthal*, 78 Ill. 124.

(s) *People ex rel. Botsford v. Darling*, 47 N. Y. 666, followed in *Geiger v. Braun*, 6 Daly, 507; *Prindle v. Anderson*, 19 Wend. 391; see *Fuller v. Sweet*, 30 Mich. 238.

(t) *Creech v. Crockett*, 5 Cush. 133.

(u) *Doe d. Parkinson v. Hauptman*, Berton, N. B. 646, *Stockton's ed.*

The point was similarly decided in the case of *Doe d. Tilt v. Stratton*,^(v) (not cited in *Doe d. Parkinson v. Hauptman*), where Best, C. J., said that at the end of the seven years the contract itself gives sufficient notice; in another more recent English case;^(w) and in several other cases.^(x) So also if the lease is to expire not at a time certain, but upon a certain contingency—as the sale of the property.^(y)

§ 11. It was urged in *Allocock v. Moorhouse*^(z) that a yearly tenancy is not like an ordinary term, but is an estate for a year *plus* a contract for a continuance of the occupation, which is not assignable at common law, the tenant remaining liable to the original lessor, until his estate is determined by the lessor accepting a new tenant.

It was held (Jessel, M. R.) that it was assignable at common law, or at least, if a future interest, by virtue of the statute of 8 & 9 Vict. c. 106, § 6. In Georgia it was thought that the tenancy at will, *i. e.* the yearly tenancy under the Statute of Frauds, was assignable only by virtue of that statute.^(a) So an agreement to lease premises at a certain yearly rent, the lessor further agreeing not to raise the rent or give notice to quit, so long as the lessee continues to pay the rent when due, will vest in the lessee an assignable interest in the premises.^(b)

A lease invalid under the Statute of Frauds, because not properly executed, is a lease at will; and there being a specified rent on the face of the deed of lease, distress will lie.^(c) The tenant at will under an invalid parol lease is entitled to the crops sown by him.^(d) The lease is good to establish the landlord's possession so

(v) 4 Bing. 446.

(w) 15 Q. B. 257.

(z) *Tress v. Savage*, 4 E. & B. 36; *Berrey v. Lindley*, 3 M. & G. 496; *Prickett v. Ritter*, 16 Ill. 96.

(y) *Hollis v. Pool*, 3 Metc. (Mass.) 350.

(x) 9 Q. B. Div. 366.

(a) *Cody v. Quarterman*, 12 Ga. 400.

(b) *In re King's Leasehold Estate*, 16 Eq. 525; see *Smart v. Harding*, 15 C. B. 652. A mere tenancy at will is not an assignable interest in land, and is therefore not within the purview

of the statute; *Whittemore v. Gibbs*, 4 Foster (N. H.), 484. A covenant in a policy of insurance that there shall be no alienation of the property insured, is not violated by an oral letting, which under the statute creates only a tenancy at will; *Lane v. Maine Ins. Co.*, 12 Me. 47.

(c) *Morton v. Woods*, L. R. 4 Q. B. 306; S. C. L. R. 3 Q. B. 658; see *Edwards v. Clemons*, 24 Wend. 480.

(d) *Davis v. Brocklebank*, 9 N. H. 73. It has been held in Tennessee that a vendee by parol in possession is pre-

as to gain title by prescription,^(e) and is a good defence to any summary proceedings by the landlord to regain possession.^(f)

§ 812. The English Statute of Frauds contained a further limitation upon parol leases, viz., that the rent reserved must amount to at least two-thirds of the value of the thing demised. This provision was not adopted in America, except in those few States which re-enacted the English statute, and indeed but little stress has ever been laid upon it in England, as parol leases have often been sustained under the exception of the statute without affirmative proof of the due proportion of the rent to the annual value of the premises.^(g) On the other hand the reservation of the rent is recognized in *Roe d. Bree v. Lees*,^(h) as necessary to turn a lease for an uncertain time into a lease from year to year; and the two-thirds value of the rent was in fact proved in a much later case in England,⁽ⁱ⁾ although no mention is made of it in the opinion. There are not wanting, moreover, cases where the courts, both in England and America, have enforced this section. In a very recent case a lease was held void because, the rent reserved not being sufficient, it was not under seal as required by the amended Statute of Frauds of 8 & 9 Vict. c. 109, §§ 2 and 3.^(j)

In New Jersey also, where prior to the revision of 1877 this provision was in force, the question arose as to its interpretation. "Leases," said Beasley, C. J.,^(k) "not exceeding three years, whereupon the rent reserved during such term shall amount to two-thirds at least of the full improved value of the thing demised, are expressly made exceptions. Such an arrangement considered in itself and as a preventive of fraud, seems to be well adapted to its end. An estate which can be terminated by either party at will is not likely to be set on foot by corrupt practices; nor is there much

summed to be a tenant at will of vendor. But although this tenancy arises not by contract but by implication of law, the party so in possession may not deny his landlord's title and hold adversely to him; *Phillips v. Robertson*, 4 Hayw. Cooper's ed. 154, S. C. 5 id. 101.

^(e) *Posge v. Chinn*, 4 Dana, Ky. 50.

^(f) *Supp v. Kensing*, 5 Robt. N. Y. 609.

^(g) *Legg v. Strudwick*, 2 Salk. 414; 44.

Ryley v. Hicks, 1 Strange, 651; *Doe v. Porter*, 3 T. R. 13. See *Butnam, J.*, in *Ellis v. Paige*, reported in note to *Coffin v. Lunt*, 2 Pick. 71.

^(h) 2 W. Bl. 1173.

⁽ⁱ⁾ *Edge v. Strafford*, 1 C. & J. 391.

^(j) *Wood v. Beard*, 2 Ex. Div. 30; 46 L. J. N. S. Q. B. Div. 100; 35 L. T. N. S. 866.

^(k) *Birckhead v. Cummins*, 4 Vroom,

more danger of a resort to such arts with regard to a lease which cannot exist beyond three years, and upon which the rent to be paid must nearly approximate to the real annual value of the thing demised."(*l*) Accordingly in *Gano v. Vanderveer*,(*m*) it was held that in an action upon a parol lease of this character it must be shown affirmatively on penalty of nonsuit that the rent was of the required value. *Gano v. Vanderveer* was decided in 1870 under the old act of November 26th, 1794.(*n*) In the revision approved March 27th, 1874, the clause is omitted.(*o*)

In a Georgia case,(*p*) the parol lease was in fact for five years, so that it could not be valid anyhow, but the court adduced as another reason for their decision the fact that there was no evidence of the reservation of rent to the amount of two-thirds of the improved value of the premises. The clause under discussion has also been considered and enforced in Canada by Harrison, C. J., although he admitted that in the decided cases sufficient attention has not been paid to this provision. It would seem clear, however, that this should be no reason for disregarding the unambiguous language of the statute.(*q*)

§ 813. As the English statute expressly limits parol leases to those not exceeding three years *from the making thereof*, it has always been held that the three years must be computed from the date of the agreement.(*r*) These early English decisions, proceeding upon the plain words of the statute, have been followed without question in those States in which the Statute of Frauds contains the clause "from the making thereof." Thus in Massachusetts(*s*) it was held that a lease for less than seven years, but which being made to begin *in futuro* would endure more than seven years from the making thereof, came within the provisions of a recording act, relating to leases "for more than seven years from the making thereof."(*t*) In Pennsylvania, accordingly,(*u*)

The "three years" date from the making of the lease under the English statute.

- (*l*) See Sugden Vend. & Pur., 1, p. 93. 1 Ld. Ray. 736, and Anon., 12 Mod. 610
 (*m*) 34 N. J. L. 293. (13 Wm. III.)
 (*n*) Nixon Dig. 358, 4th ed. (*s*) Chapman v. Gray, 15 Mass. 439.
 (*o*) Revision of 1877, 444. (*t*) See Hurley v. McDonell, 11 U. C. Q. B. 208.
 (*p*) Cody v. Quarterman, 12 Ga. 386. (*u*) Wheeler v. Conrad, 6 Phila. 209;
 (*q*) Jackson v. Yeomans, 39 U. C. Q. B. 208. Whiting v. Pittsburgh Opera House Co.,
 B. 280. 88 Pa. St. 100.
 (*r*) Holt, C. J., in Rawlins v. Turner, 88 Pa. St. 100.

and New Jersey,^(v) the English rule has been followed, in the former State without comment. The question always is, whether the interval from the making the agreement to the expiration of the lease is or is not more than three years.^(w)

In a Canadian case there was an (unsigned) memorandum on the back of a lease, that if the lessee cleared more land, he was to have the same rent free for the first three years. It was said that the memorandum was void because the three years were to begin at a future time, viz., the clearing of the land.^(x) And in like manner a lease made in November for three years, commencing on the first of May next, has been held within this provision of the New Brunswick Statute of Frauds.^(y)

In another case, according to the terms of a three years' lease in writing but not under seal, possession was to be given whenever the first monthly payment of rent was made. The instrument was held void in an action of ejectment by the lessee, because, not coming within the exception of the second section of the Statute of Frauds of leases not exceeding three years from the making thereof, it should have been under seal by statute of 12 Vict. c. 71, § 4 (Canada), and as the lessee was never in possession under the lease, he was not a tenant from year to year.^(z)

§ 814. The omission of the clause has generally been regarded * as signifying that the number of years is to be consid- The Ameri-
ered solely with reference to the duration of the term. can statutes;

(v) *Birkhead v. Cummins*, 4 Vroom, 51.

(w) *Clarke v. Serricks*, 2 U. C. Q. B. 535; *Ryley v. Hicks*, 1 Stra. 651; *Wiggins v. Keizer*, 6 Ind. 252; *Stackberger v. Mosteller*, 4 Ind. 461.

(x) *Kaatz v. White*, 19 U. C. C. P. 36.

(y) 1 Rev. Stat. c. 123; *Brewing Co. v. Berryman*, 2 Pug., N. B. 115.

(z) *Hurley v. McDonell*, 11 U. C. Q. B. 208; *Robinson, C. J.*, went on to notice the distinction between the Canadian stat. 12 Vict. c. 71, and the British stat. 8 & 9 Vict. c. 106, § 3, as to leases required by law to be in writing, and said that the Canadian statute left untouched the case of a verbal demise for less than three years. "It would seem absurd to

hold that a verbal lease for a year is sufficient, but that a written lease for the same term is void unless it be sealed. Yet that would be the effect of the act receiving a construction according to its language." The Chief Justice did not allude to the fact that the stat. 12 Vict. c. 71, § 4, had been repealed three years before by 14 & 15 Vict. c. 7, §§ 1 and 4. The former statute provided that "no lease in writing * * * shall be valid as a lease, unless the same be made by deed." Section 4 of the latter statute changed the wording so as to conform to the English statute, "that a lease required by law to be in writing * * shall be void at law unless made by deed." In effect August, 1851, Pro-

effect of the omission of the words "from the making thereof."

It has been so regarded in Colorado.(a) Iowa.(b) and Georgia.(c) In New York, prior to the revision of 1830, the statute was upon this point identical with the English Statute of Frauds. By the Revised Statutes, however, it was provided that "every contract for the leasing for a longer period than one year * * * shall be void unless in writing." Notwithstanding the significance of the change of phrase in the revision, together with the explicit language itself of the new statute, it was at first held (d) that no stress should be laid upon it for three reasons: first, because the lease passes a present interest; second, because a series of future parol leases might be indefinitely limited one after the other; and third, because to suppose that the Revised Statutes did not make any change on this point best carried out the spirit of the Statute of Frauds. But the contrary was soon held,(e) and the former doctrine denied. This view has since been sustained,(f) and the law settled in New York.(g)

§ 815. The similar question has several times arisen whether such verbal leases good under the second section of the statute are avoided by that section which requires contracts not to be performed in one year to be in writing. It has generally been decided that they are not. In Lord Bolton v. Tomlin,(h) it was held that the terms of a tenancy for a year to begin at a future date (at least if executed by an actual demise) could be proved by parol, notwithstanding the *infra annum* clause; Lord Denman, in the conclusion of his opinion, placing his decision upon the general ground that "Leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth."

vincial Stat. vol. 3, p. 1805. The statute of 12 Vict. c. 71, §§ 4, 14, left the law as respects surrenders in law as before; Lewis v. Brooks, 8 U. C. Q. B. 576.

(a) Thatcher, C. J., in Sears v. Smith, 3 Col. 290.

(b) Sobey v. Brisbee, 20 Ia. 105; Jones v. Marcey, 49 id. 188.

(c) Steininger v. Williams, 63 Ga. 475.

(d) Croswell v. Crane, 7 Barb. 194.

(e) Taggard v. Roosevelt, 2 E. D. Smith, 100.

(f) Young v. Dake, 1 Seld. 5 N. Y. 465.

(g) Becar v. Flues, 64 N. Y. 518. In Michigan, Whiting v. Ohlert, 18 N. W. Rep. 219, follows Young v. Dake.

(h) 5 A. & E. 856.

In this case, *Edge v. Strafford*(i) and *Inman v. Stamp*(j) were referred to as concerning executory agreements, and not actual parol leases. These cases have, however, been often regarded as opposed to *Lord Bolton v. Tomlin*, and as overruled by that case. "The effect of the Statute of Frauds," said the court in *Edge v. Strafford*, "so far as it applies to parol leases not exceeding three years from the making is this, that the leases are valid, and that whatever remedy can be had upon them in their character of leases may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."(k) *Edge v. Strafford* seems to have been fully considered by the court in *Lord Bolton v. Tomlin*, for it is not only cited as above noticed, but reference is also made to 2 Selywn's *Nisi Prius*, 844, where the case is stated.

Our courts have as a rule followed *Lord Bolton v. Tomlin* in ruling that the second and fourth sections of the statute refer to different subjects, for the reasons well stated by the Supreme Court of Colorado.(l) "From its collocation in the chapter" (of the Colorado Statutes) "from its context in the same section, and from the further controlling consideration that a verbal lease for the same period is elsewhere in the same chapter by apt words specifically provided for, it is evident that the agreement referred to in this provision is in no way connected with the leasing of lands." The point has been similarly decided in Iowa(m) and Indiana.(n) The rule appears to be the same also in Connecticut,(o) Ohio,(p) Michigan,(p') and Upper Canada.(q) In New York the view of *Inman v. Stamp* was at

(i) 1 Cr. & J. 391.

(j) 1 Stark. N. P. 10.

(k) See *Ryley v. Hicks*, 1 Stra. 651, commented on in *Edge v. Strafford*, 1 Cr. & J. 395; 1 Tyrwh. 293.(l) *Shears v. Smith*, 3 Col. 288; 16 Alb. L. J. 167; 9 Chic. Legal News, 386.(m) *Sobey v. Brisbee*, 20 Iowa, 105; *Jones v. Marcey*, 49 Iowa, 188.(n) *Huffman v. Starks*, 31 Ind. 474. See *Wiggins v. Keizer*, 6 Ind. 252; *Stackberger v. Mosteller*, 4 Ind. 461, which followed *Inman v. Stamp*, and was overruled in *Huffman v. Starks*;*Railsback v. Walke*, 81 Ind. 409; *Naah v. Berkmeir*, 83 Ind. 536.(o) *Eaton v. Whitaker*, 18 Conn. 229.(p) *Grant v. Ramsey*, 7 Ohio St. 165.(p') *Tillman v. Fuller*, 13 Mich. 113, on the ground that the contract is performed by the making of the lease. The Michigan and New York statutes being similar, the Supreme Court of the former State in *Whiting v. Ohlert*, 18 N. W. Rep. 219 (Campbell, J.) followed *Young v. Dake*, 5 N. Y. 465 and *Becar v. Flues*, 64 N. Y. 518. See note to *Whiting v. Ohlert*, in 23 Am. Law R. N. S. 384.(q) *Clarke v. Serricks*, 2 U. C. Q. B. 535.

first adopted ;(r) but this was soon overruled, and the *infra annum* clause of the statute (2 R. S. 135, § 2, Sub. 1), as a part of Title 2, referring to "fraudulent conveyances and contracts relating to goods, chattels, and things in action," was held not to apply to contracts relating to land. The argument drawn from the report of the revisers was answered by the fact that the legislature and not the revisers struck out the words which were in the old act.(s)

The contrary has been held in Illinois,(t) though if the lessee has taken possession he is liable for use and occupation.(u) And so in Alabama,(v) Massachusetts,(w) Georgia,(x) (though the law has been altered by § 2280 of the Code),(y) and Kansas.(z) In Kentucky the statute provides, that no action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless," &c., and the statute of conveyances provides "that no estate of inheritance or freehold, or for a term of more than five years, shall be conveyed from one to another unless the conveyance be declared by writing sealed and delivered." Under these statutes, it was said, it might be doubted, were it an open question, whether the first statute was intended to apply to any other than executory contracts for the sale, lease, &c., of land and not to executed contracts for a term of not more than five years; but the Kentucky decisions had indiscriminately applied the first statute to both classes of cases and disallowed the recovery of rent upon an executed contract of lease for more than a year.(a)

(r) *Croswell v. Crane*, 7 Barb. 194.

(v) *Parker v. Hollis*, 50 Ala. 413.

(s) *Young v. Dake*, 1 Seld. 5 N. Y.

(w) *Delano v. Montague*, 4 Cush. 42.

465; *Taggard v. Roosevelt*, 2 E. D. Smith, 100 (the Syllabus of this case is misleading); *Becar v. Flues*, 64 N. Y.

(z) *Atwood v. Norton*, 31 Georgia, 507.

518; *Whitney v. Allaire*, 1 N. Y. 309;

(y) *Steininger v. Williams*, 63 Ga. 476.

Trull v. Granger, 8 N. Y. 115; *Reeder v. Sayre*, 6 Hun. 562, 70 N. Y. 180;

(z) *Wolf v. Dozer*, 22 Kan. 436.

Thomas v. Nelson, 69 N. Y. 118.

(a) *Morehead v. Watkins*, 5 B. Mon. 229. See *Pulse v. Hamer*, 8 Oregon,

(t) *Olt v. Lohnas*, 19 Ill. 576.

251-254. "We think that where one man agrees by parol to lease land to another for a term of years, to begin in the future, and agrees at the same time to put such parol contract in writing,

(u) *Warner v. Hale*, 65 Ill. 395; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421; *Wheeler v. Frankenthall*, 78 Ill. 124; *Smith v. Kinkaid*, 1 Bradw. 623.

§ 816. Where the Statute of Frauds invalidates the lease so as to render the ordinary actions unavailable to the lessor, he may yet by an action for use and occupation recover compensation from the lessee for the time during which he has actually occupied the premises. In this action the agreement itself will be evidence of the value of the premises, though of course inadmissible for other purposes.^(b) Such an agreement is only evidence of the amount to be paid where the lessee has enjoyed under it. So, where the lessee took under an unsigned agreement which the lessor failed to fulfill in the principal points, the jury were permitted to find for whatever value which they considered the lessee had enjoyed in the premises.^(c) and a parol lease under which no act has been done by the lessee who repudiates it, but occupies the premises, may be treated by the lessor as a subsisting lease, or else he may sue for use and occupation.^(d) But not so if by agreement no rent is to be paid until the performance of certain conditions which are not fulfilled.^(e)

The same principle has been applied where the defendant, in consideration of a parol lease for more than three years being made to him of certain premises, agreed to put certain repairs upon them, and enjoyed the said premises during the term. He was held liable in *assumpsit* for such repairs, and not merely for such as the law requires from tenants from year to year.^(f) The lessor, it should be added, may recover under the common counts.^(g) In

and no consideration passes between the parties, either party may disregard the parol contract, and if the lessee goes on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus attained will not give him any rights under such parol contract."

(b) *DeMedina v. Polson*, Holt, 49; *Doe v. Cochran*, 1 Scam. 210; *Galbraith v. Fortune*, 10 U. C. C. P. 109; *Lyman v. Snarr*, 10 U. C. C. P. 462; *Maverick v. Donaldson*, 1 Ala. 536; *Folsom v. Perrin*, 2 Cal. 603; *Moorehead v. Watkyns*, 5 B. Mon. 229. But see *Roberts v. Tennell*, 3 B. Mon. 251;

Calvert v. Simpson, 1 J. J. Marsh. 548; also *Ragsdale v. Lander*, 80 Ken. 60; *Little v. Martin*, 3 Wend. 219; *Pierce v. Pierce*, 25 Barb. 248; *Thomas v. Nelson*, 69 N. Y. 118; *Voluntine v. Godfrey*, 9 Vt. 189.

(c) *Tomlinson v. Day*, 2 Brod. & B. 680; *Sweetman v. Ambler*, 8 Ex. 72; *Mayor of Thetford v. Tyler*, 8 Q. B. 95.

(d) *Scott v. Hawsman*, 2 McLean, 180.

(e) *Toronto Hospital v. Heward*, 8 U. C. C. P. 84; *Flood v. O'Gorman*, 4 Ir. C. L. R. Q. B. 578.

(f) *Richardson v. Gifford*, 1 A. & E. 36; *Beale v. Sanders*, 5 Scott, 56.

(g) *Parker v. Hollis*, 50 Ala. 413.

a Kentucky case^(h) a verbal lease for two years was made. The plaintiff sued for the value of the use and occupation of the premises. The defendant traversed both the value of the use and occupation and the fact of occupation itself. These points were not submitted to the jury, but judgment was entered for \$300 (the contract price) upon their verdict that it was a lease for two years. This was held to be error, as the plaintiff could not recover on the verbal contract, and the other points should have been submitted to the jury.

§ 817. In computing the duration of the lease no general rule can be stated, as the day of the date is excluded or included therein according to all the circumstances of the case. In an early Pennsylvania case⁽ⁱ⁾ it was said that where there is nothing in the lease to the contrary, the day of the demise is included in estimating the term, but that this rule of construction was not absolute but depended on the context of the lease. In a later case,^(k) likewise, it was held that the duration of time is estimated from and including the date of the instrument, in order that an immediate interest may be held to have passed and as being in favor of the grantee and against the grantor; and, in a still more recent case,^(l) the inclusion of the first day and exclusion of the last was clearly stated as the rule of the common law. In New York^(m) it seems to be held that a lease from May 1st, 1829, to May 1st, 1830, excludes the first day, and a custom that such a lease expired at noon on May 1st, 1830, was admitted in evidence; the English decisions being alluded to as vacillating. In Massachusetts⁽ⁿ⁾ a lease for years from the first day of July was held to begin upon the second of July, the court citing 4 Cruise Dig., Greenleaf Ed., title XXXII., c. 5, § 6, for rule that if a lease be made to hold from the date or the day of the date, that date is excluded; but if it be to hold from the making, it includes the day.^(o)

In New Hampshire it has been held that where a lease bears a

(h) *Ragsdale v. Lander*, 80 Ky. 61. being regarded as not well considered.

(i) *Donaldson v. Smith*, 1 Ashmead, 197. (m) *Wilcox v. Wood*, 9 Wend. 348.

(n) *Atkins v. Sleeper*, 7 Allen, 487.

(k) *Lysle v. Williams*, 15 S. & R. 135.

(o) *Atkins v. Sleeper* was followed in

(l) *Thomas v. Afflick*, 16 Pa. St. 14; *Perry v. Provident Life Insurance and Goewiler's Estate*, 3 P. & Watts, 200, *Investment Co.*, 99 Mass. 162.

specific date, and the time of the commencement is not otherwise expressed, the day of the date of the lease is to be regarded as the term from which the period of the lease is to be computed. The court, in the case cited below, considered this construction as being in strict analogy to that given to notes and other instruments for the payment of money, believing that in this particular there was no just ground for discrimination.(p) On the whole, from an examination of the cases we may conclude that the diversity of the rule appears to have been caused by a desire on the part of the courts so to apply it in each particular case as not to work injustice.(q) This subject is not especially important in this connection, and is elaborately discussed in the authorities noted below.(r)

§ 818. Whether an instrument is to be deemed a lease, or only an agreement for a lease, is a question which the courts have often been called upon to decide. No *definite* rule can be collected from the cases for the interpretation of such instruments beyond the rather unsatisfactory one, that the question depends upon the intention of the parties to be collected from the whole instrument.(s) It may, however, be stated as generally true that an agreement for a lease will be treated as a present demise when it does not involve the execution of any formal lease, and possession is taken under it.(t) If, however, the agreement contemplates the execution of some further instrument in order to carry into effect the intention of the parties, it cannot operate as a present demise until such instrument is executed; and a Court of Chancery will decree specific performance of the agreement for that purpose.(u)

Leases and
agreements
for lease.
Distinction.

(p) *Keyes v. Dearborn*, 12 N. H. 52.

(q) *Marys v. Anderson*, 12 Harris, 272.

(r) Wood on Statute of Limitations, § 54, p. 100, n. 2, and Robinson's Practice, vol. I., title XVII. See also *Pugh v. Duke of Leeds*, 2 Cowp. 714, a leading case.

(s) *Roe d. Jackson v. Ashburner*, 5 T. R. 163; *Morgan d. Dowling v. Bissell*, 3 Taunt. 65; *Doe v. Smith*, 6 East, 530; *Thornton v. Payne*, 5 Johns. 74; *Bacon v. Bowdoin*, 22 Pick. 401; *Griffin v. Knisely*, 75 Ill. 411, and cases *infra*.

(t) *Kabley v. Worcester Gaslight Co.*, 102 Mass. 392; *McGrath v. Boston*, 103 Mass. 369; *Shaw v. Farnsworth*, 108 Mass. 357; *Chapman v. Bluck*, 5 Scott, 515; S. C. 4 Bing. N. C. 187; *Chapman v. Towner*, 6 M. & W. 100; *Tarte v. Darby*, 15 M. & W. 601; *Doe d. Coore v. Clare*, 2 T. R. 739; *Prosser v. Henderson*, 20 U. C. Q. B. 440.

(u) *Goodtitle d. Estwick v. Way*, 1 T. R. 735; *Shepherd v. Walker*, 44 L. J. Ch. 648; S. C. L. R. 20 Eq. 659; *M'Lean v. Young*, 1 U. C. C. P. 62; *Kyle v. Stocks*, 31 U. C. Q. B. 47;

But if the agreement contains words of present demise, such as "hereby lets," "doth let," &c., and the usual requisites of a lease, it will be held to operate as such; and the mere fact that it provides for the execution of a future lease will not prevent its having such effect; the intent of the parties being held to govern.^(v) The agreement must be full and complete, and contain all the essential elements of a lease^(w) and unconditional in its terms, not to take effect upon a contingency.^(x)

§ 819. The statute of 8 & 9 Vict. c. 106, § 3, supplementary to the Statute of Frauds, required leases to be under seal or otherwise to be void at law. Before the passage of this statute it had been the tendency of the English courts to construe doubtful parol agreements or contracts as *leases*, and not as mere agreements for a lease;^(y) and in one case at least, subsequent to the statute, the influence of the old cases survived.^(z) The case last cited, however, was soon doubted on the ground that while before 8 & 9 Vict. c. 106, to interpret a doubtful instrument as a lease worked no injustice, yet since that statute the parties must on the rule of *Stratton v. Pettit* be supposed to have intended a void instrument.^(a) This doctrine was accordingly overruled in many cases which have settled the law upon this point in England in the Courts of Common Pleas,^(b) of Queen's Bench,^(c) and Chancery.^(d) In the last case cited, the court attempted to distinguish *Stratton*

Jones v. Reynolds, 1 Q. B. 506; *Potter v. Mercer*, 53 Cal. 667.

(v) *Poole v. Bentley*, 2 Camp. 286; S. C. 12 East, 168; *Tempest v. Rawlings*, 13 East, 19; *Doe d. Walker v. Groves*, 15 East, 246; *Chapman v. Bluck*, 4 Bing. N. C. 187; *Rollason v. Leon*, 7 H. & N. 73; *Hurlbut v. Post*, 1 Bosw. 28; *Becher v. Woods*, 16 U. C. C. P. 29; *Grant v. Lynch*, 6 U. C. C. P. 178; S. C. 14 U. C. Q. B. 148.

(w) *Harker v. Birkbeck*, 3 Burr. 1563; *Dunk v. Hunter*, 5 B. & Ald. 322; *Browne v. Warner*, 14 Ves. 158; *Taylor v. Bradley*, 39 N. Y. 129; *Sourwine v. Truscott*, 17 Hun, 432; *Prosser v. Henderson*, 20 U. C. Q. B. 440; *Cheney v.*

Taylor, 1 U. C. Q. B. 166; *Medlin v. Steele*, 75 N. Car. 155.

(x) *Doe d. Bromfield v. Smith*, 6 East, 530; compare *Doe d. Coore v. Clare*, 2 T. B. 744. See an interesting article on this subject in 27 *Solicitors' Journal*, p. 579.

(y) *Tidey v. Mollett*, 16 C. B. N. S. 308.

(z) *Stratton v. Pettit*, 16 C. B. 435.

(a) *Rollason v. Leon*, 7 H. & N. 77, in the Exchequer.

(b) *Tidey v. Mollett*, 16 C. B. N. S. 308; *Hayne v. Cummings*, 16 C. B. N. S. 421.

(c) *Bond v. Rosling*, 1 B. & S. 371; 8 Jur. N. S. 78.

(d) *Cowen v. Phillips*, 33 Beav. 18;

v. Pettit, (e) and construed the words of the statute "shall be void at law" to mean merely void as a lease, observing that if the legislature had intended to deprive the instrument of all efficacy, it would have said that it should be "void to all intents and purposes." (f) A like interpretation was put upon the similar act of 7 & 8 Vict. c. 76 § 4, in force from December 31st, 1844, to October 1st, 1845, and then superseded by the act of 8 & 9 Vict. c. 106. (g)

Parker v. Taswell, 2 De G. & J. 559; S. C. 27 L. J. Ch. 812.

(e) 16 C. B. 435.

(f) See *Drury v. Macnamara*, 5 E. & B. 612; *Bacon v. Bowdoin*, 22 Pick. 401; *Kabley v. Gas Company*, 102 Mass. 392; *McGrath v. Boston*, 103 Mass. 369; *Taylor v. Bailey*, Wright, Ohio, 646.

(g) *Burton v. Reeve*, 16 M. & W. 307; S. C. 16 L. J. Ex. 85; *Tress v. Savage*, 4 E. & B. 110; *Doe d. Davenish v. Moffatt*, 15 Q. B. 262. It is now settled in England that an agreement to grant a lease, not stating any time for the commencement of the term, cannot be construed as an agreement for a lease to commence from the date of the agreement, and it is insufficient under the Statute of Frauds, as it does not contain all the material terms of the contract. *Marshall v. Berridge*, 19 Ch. Div. 233; 25 Alb. L. J. 213; 45 L. T. N. S. 599; *Blore & Sutton*, 3 Merivale, 237; *Wyse v. Russell*, L. R. Ireland, 11 Ch. Div. 173. Said Jessel, M. R., in *Marshall v. Berridge*, an action for specific performance of such a contract to grant a lease, "the case of *Blore v. Sutton* is exactly in point, which Mr. J. Fry

in his previous decision attempted to distinguish on the ground that it did not appear in the report that the date on which the memorandum of agreement was signed appeared on the memorandum itself." Having stated that the record showed that the date did in point of fact thus appear, the Master of the Rolls continued, "But, independently of that, I am quite unable to concur in the decision in *Jaques v. Millar*, 6 Ch. Div. 155. No doubt there is abundant authority for saying that if on a given day A. agrees to let and B. agrees to take a house, and that operates as a lease or present demise at law, then of course the words being in the present tense relate to the date of the instrument, and the term commences from that date. That is what is meant by *Doe v. Benjamin*, 9 A. & E. 644, and that class of cases." In cases of executory agreements, not only is it not to be supposed that the lease commences from the date of the agreement, but the very contrary is to be supposed. There is always something more to be done, for at all events there is the lease to be prepared.

CHAPTER XXXVI.

EXPRESS TRUSTS—WRITTEN PROOF REQUIRED UNDER STATUTE OF FRAUDS.

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| <p>§ 820. 29 Car. II. c. 3, §§ 7, 8, and 9, relating to trusts.</p> <p>§ 821. The nature and character of express trusts.</p> <p>§ 822. Mere breach of agreement will not create trust.</p> <p>§ 823. Mere breach of agreement not fraud.</p> <p>§ 824. Purchase-money belonging to the alleged trustee.</p> <p>§ 825. Generally breach of agreement is not an express but a constructive trust.</p> <p>§ 826. Distinction in case of pre-existing contract.</p> <p>§ 827. Express trusts arising from payment.</p> <p>§ 828. Fraud.</p> <p>§ 829. By discouraging bidding at sheriff's sales.</p> <p>§ 830. Examples of express and implied trusts.</p> <p>§ 831. Proof of facts raising trust.</p> <p>§ 832. The rule.</p> | <p>§ 833. Exceptions.</p> <p>§ 834. Uses prior to Car. II. c. 3.</p> <p>§ 835. May create trust by parol.</p> <p>§ 836. Written proof executed after creation of trust.</p> <p>§ 837. Character of written evidence required.</p> <p>§ 838. Character of parol evidence required when so provable.</p> <p>§ 839. Parol declarations of holder of legal title.</p> <p>§ 840. Written evidence required to prove express trusts.</p> <p>§ 841. Informal memoranda sufficient.</p> <p>§ 842. Or letters.</p> <p>§ 843. Or promissory notes.</p> <p>§ 844. As bonds, deeds, mortgages, &c.</p> <p>§ 845. Or pleadings, depositions, &c.</p> <p>§ 846. And writings in the nature of wills.</p> <p>§ 847. And book entries or pamphlets.</p> <p>§ 848. Parol admissible to supplement the written evidence.</p> <p>§ 849. As parol declarations.</p> |
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§ 820. THE provision of the English Statute of Frauds relating to trusts are as follows :—(a)

29 Car. II. c. 3, §§ 7, 8, and 9, relating to trusts.

VII. And be it further enacted by the authority aforesaid, that from and after the said four-and-twentieth day of June all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is

(a) English Statutes at Large, vol. 3, page 385.

by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise, or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust and confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

In considering the subject of trusts as affected by these provisions, it may in the first place be noticed that they are either express, resulting, and constructive or implied.(b)

§ 821. Express trusts arise from express contract or direction to hold in trust, and require an agreement of the minds of the parties, and will not be raised if the existence of such an agreement is uncertain, or not distinctly shown;(c) and a mere promise to hold in trust for another without some of the other elements of a contract is no more than a promise to convey or assign, and not a trust.(d) As if the promise is made upon no proper consideration, the agreement being denied in the defendant's answer;(e) or if it is made by a husband to his wife, she paying nothing upon the purchase, and the title passing to his assignees in bankruptcy who paid off the purchase-money incumbrances; the wife upon the husband's promise, although he bought at the sale as her guardian, could not raise a trust in her favor, as against his creditors.(f) So where a

The nature and character of express trusts.

(b) As to uses and trusts, see Tiedman on Real Property, § 507.

(c) Harris v. Barnett, 3 Grant, 339; Davis v. Wetherell, 11 Allen, 19 (n.); Freeman v. Kelly, 1 Hoffman, Ch. 92.

(d) Perry v. McHenry, 13 Ill. 227; Walter v. Klock, 55 Ill. 362; Hogg v. Wilkins, 1 Grant, Pa. 67; Getman v. Getman, 1 Barb. Ch. 499; Cecil Bank v.

Snively, 23 Md. 261; Pattison v. Horn, 1 Grant, Pa. 301; Kisler v. Kisler, 2 Watts, 323; Fischli v. Dumarsely, 3 A. K. Marsh, 23; Barnet v. Dougherty, 32 Pa. St. 371; Reed v. Cox, 6 Ired. Eq. 511. (e) Cravens v. Cravens, Morr. (Iowa), 235.

(f) O'Hara v. Dilworth, 72 Pa. St. 403.

guardian of certain minors succeeded in obtaining land which had once belonged to the father of the minors, because he represented he was buying for the minors and promised to convey to them.(g) And the rule is applied also where the promise was to advance money for the purchase, the promissor to transfer title upon repayment, or, in other words, where there was nothing which could be enforced by specific performance.(h) But if land was bought with money borrowed upon collateral by the plaintiff from the defendant, upon whose books charges were made against the plaintiff of the amount borrowed, a trust will be declared in the land, upon the defendant's promise to transfer it upon repayment.(i)

§ 822. It is well settled also that the breach of a mere agreement, whether made before or after the legal title has been procured, or whether an express one in parol to hold in trust, or one from which a relation of trust is sought to be raised by construction, will not alone, there being no fraud or payment, give rise to a trust either express or constructive.(j) An application of this is seen in the rule, so far as it is the law, that an agent by parol buying land and paying for it with his own money, cannot be made a trustee for his principal.(k) Nor will a trust be enforced in favor of one of certain parties interested in land about to be divided under proceedings in partition, who agrees

Mere breach of agreement will not create trust.

(g) *Rogers v. Simmons*, 55 Ill. 76.
 (h) *Whiting v. Gould*, 2 Wis. 552;
Moote v. Scriven, 33 Mich. 504.
 (i) *Keller v. Kunkel*, 46 Md. 565, distinguishing *Dorsey v. Clarke*, 4 H. & J., 556, upon the fact of the plaintiff being charged with amounts in the defendant's books.
 (j) *Russ v. Mebias*, 16 Cal. 350; *Burt v. Wilson*, 28 Cal. 632; *Perry v. McHenry*, 13 Ill. 227; *Walter v. Klock*, 55 Ill. 362; *Lantry v. Lantry*, 51 Ill. 464; *Morrall v. Waterson*, 7 Kan. 202, citing *Johnston v. Lamotte*, 6 Rich. Eq. 347; *Hawkins v. King*, 2 A. K. Marsh, 109; *Booth v. Turle*, L. R. 16 Eq. 182; *Marsham v. Conklin*, 21 N. J. 546; *Arnwine v. Carroll*, 4 Halst. Ch. 620, 886; *Merritt v. Brown*, 4 C. E. Green, 289; *Mathews v. Leaman*, 24 Ohio St. 623;

Sidle v. Walters, 5 Watts, 391; *Morey v. Herrick*, 18 Pa. St. 128; *Lloyd v. Lynch*, 28 Pa. St. 423; *Robertson v. Robertson*, 9 Watts, 36; *Peebles v. Reading*, 8 S. & R. 491; *Sprinkle v. Hayworth*, 15 Am. L. Reg. 36; *Porter v. Mayfield*, 21 Pa. St. 264; distinguished in *Lingenfelter v. Ritchey*, 58 Pa. St. 488, as a case where there was no breach of faith or fraud. *Dollar Savings Bk. v. Bennet*, 76 Pa. St. 402; *Fricke v. Magee*, 10 W. N. C. 50; *Carhart's App.*, 78 Pa. St. 100; *Bedilian v. Seaton*, 17 Leg. Int., Pa. 356; 3 Wall. Jr. 279; *Hogg v. Wilkins*, 1 Grant, Pa. 67; *Perkins v. Cheairs*, 2 Baxt. (Tenn.) 198; *Durant v. Davis*, 10 Heisk, 528; *Buck v. Copland*, 2 Call, 218.

(k) *Perry v. McHenry*, 13 Ill. 227. See also *Stephenson v. Thompson*, 13 Ill. 190.

to the proceedings only upon making an arrangement with another of the parties that a certain portion of the estate should be held in trust for him.(l)

In Pennsylvania, however, where there is no fraud the breach of a parol agreement within the Statute of Frauds will give rise to an action on the case for damages, the measure of which is the money paid and expenses incurred on the faith of the bargain; but if these are not shown, damages are merely nominal. Where, however, there is fraud, damages may be had for the value of the bargain.(m) No valid trust arises where the share of one tenant in common was conveyed to another without any consideration, and upon an oral agreement to reconvey or hold it for the benefit of the grantor.(n) Therefore it would seem that any agreement on the part of one who has acquired title to land, made subsequently to his purchase, that he holds the title for another, and is ready to convey upon being reimbursed, is *a fortiori* an express and not a resulting trust, when a trust at all, and not a mere contract for the conveyance of land.(o)

After much discussion and several conflicting *dicta*, the rule in Pennsylvania is said to be settled, that a mere declaration by one that he is about to purchase land for another without any previous arrangement, will not raise a trust for the benefit of the latter. To work such an effect the purchase must be in pursuance of a prior agreement founded in a sufficient consideration, or the means of

(l) *Morley v. Davison*, 20 Grant, Ch. 101.

(m) *Thompson v. Sheplar*, 72 Pa. St. 165.

(n) *Blodget v. Hildreth*, 103 Mass. 486; citing *Walker v. Locke*, 5 Cush. 90.

(o) *Perry v. McHenry*, 13 Ill. 227; *Walter v. Klock*, 55 Ill. 362; *Hogg v. Wilkins*, 1 Grant, Pa. 67; *Getman v. Getman*, 1 Barb. Ch. 499; *Cecil Bank v. Snively*, 23 Md. 261; *Pattison v. Horn*, 1 Grant, Pa. 301; *Kisler v. Kisler*, 2 Watts, 323; *Fischli v. Dumaresly*, 3 A. K. Marsh. 23. In *Loomis v. Loomis*, 60 Barbours, 22, where the plaintiff's farm was sold under a foreclosure, and was bought by Ward, who orally prom-

ised the plaintiff that upon being repaid the amount he paid for the farm, he would reconvey to the plaintiff, who in the meantime remained in possession. The plaintiff and Ward and the defendant afterwards made a parol agreement, under which Ward conveyed to the defendant, who agreed to reconvey upon the same terms which Ward had formerly made, the plaintiff to continue to remain in possession, and receive the rents and profits; it was held that this agreement was within the Statute of Frauds; that there was no express trust because the plaintiff had no property to put in trust, and that there was no valuable consideration given by the plaintiff to create a resulting trust.

making the purchase, or at least some portions of it, must be furnished by him who claims to be the *cestui que trust*.^(p) The cases in Pennsylvania are not uninteresting in their illustration of this point, where it is to be remembered the seventh and eighth sections of the English statute were not in force prior to 1856.^(q)

(p) *Blyholder v. Gilson*, 18 Pa. St. 137; *Morey v. Herrick*, 18 Pa. St. 128.

(q) In *Brown v. Dysinger*, 1 Rawle, 413 (1829), parol evidence of declarations made by a purchaser at sheriff's sale that he was bidding for another is held to be admissible to establish a trust for the person for whom the purchaser declared he was bidding. The court say that the declarations led to the prevention of bidding. The evidence was received because there was shown to be fraud in the purchaser; but a trust, though not declared in writing, was valid notwithstanding the Statute of Frauds. The opinion of the court was dissented from by Tod, J., who, while upholding the admission of the parol evidence, finds that there was no greater fraud than what is implied in every non-performance of a promise.

Peebles v. Reading, 8 S. & R. 484, decided that the act of 21st March, 1772, for the prevention of frauds and perjuries, does not prevent a declaration of trust by parol; therefore where lands are sold under execution, parol evidence may be given of the declarations of the purchaser that he was buying for the former owner, but such evidence is to be received with great caution.

Kisler v. Kisler, 2 Watts, 323, cited several cases as instancing the disregard of the English definition of resulting trusts, and recognized the *dictum* that a parol declaration of trust by the grantor is good without more; a parol declaration of trust by the grantee must be on consideration under a contract with the *cestui que trust*, or where he has paid money: preventing bidders is actual fraud on which a trust can be rested,

and the rule rests upon fraud, and not contract, as suggested in *Brown v. Dysinger*. It was further laid down, that parol evidence is proper of admissions by the grantee of certain facts from which the law raises a trust, not, however, of a contract on the part of the grantee; and that the admission of parol declarations is not peculiar to Pennsylvania, citing *Halcott v. Markant*, Prec. in Ch. 168; *Wilson v. Foreman*, 2 Dick. Ch. 593. The court also said that in *Gregory v. Setler*, 1 Dall. 193, and *German v. Gabbald*, *infra*, the trust came from the money paid by the *cestui que trust*, not from declarations of the alleged trustee; and in *Wallace v. Duffield*, 2 S. & R. 521, the declarations of the alleged trustee were resorted to, but unnecessarily, as the part payment of money raised the trust *pro tanto*: but a trust where one buys, pays, and promises to hold for another is really an agreement to convey upon being reimbursed and is within the Statute of Frauds. In *Sidle v. Walters*, 5 Watts, 391, it was held: "that if the court below charged that, when a man declares publicly, merely that he purchased for another without any previous agreement, or without any advance of money, this is such a transaction as raises a trust which can be enforced in equity; it was in opposition to the principles established in *Kisler v. Kisler*, *supra*, and would amount to a repeal, so far as such sales are concerned, of the Statute of Frauds and Perjuries, and would open the door to the very mischief which the statutes were intended to guard against." Whether a subsequent payment of part of the purchase-money will vary the law is not

§ 823. Nor does the abuse of confidence which is involved in the breach of every agreement amount to such fraud as will raise

decided, but it is said that in *Kisler v. Kisler* a distinction is clearly taken between a subsequent contract and a trust.

In *Robertson v. Robertson*, 9 Watts, 34 (1839), it is again said that trusts can be declared by parol, *German v. Gabbald* being cited as a breach of contract not constituting a trust, and *Thompson v. White* distinguished as a case of fraud. In *Stewart v. Brown*, 2 S. & R. 461, the parties had previously been joint tenants, and when the land was sold for taxes the agreement was that one should buy for both; this was regarded as a trust. The remarks of the court in *Peebles v. Reading* were questioned in *Kisler v. Kisler*, which, while laying down the rule that where one obtains land by discouraging bidders a resulting trust will be decreed, goes on to suggest that where the land generally is obtained by an artifice the trust may be decreed, and would, it seems, include the case of an agent buying land with his own money which, under English decisions, is held to raise no trust. *Brown v. Dysinger* is distinguished as a case where, by misrepresentation, the purchaser bought at a low price. In *Haines v. O'Conner*, 10 Watts, 320, the case of *Brown v. Dysinger* is again discussed, and it is said that it is a misapprehension of what was intended to be decided to understand that case to have ruled "that if I proclaim that I hold my house for B. on terms of conveying it to him when he shall reimburse me what I have paid, it is a trust which will be enforced."

In *Blyholder v. Gilson*, 18 Pa. St. 137, the court say: "Whatever may have been at one time the impression prevailing upon this point, produced, perhaps, by the peculiar views of the learned judge who pronounced the

judgment of the court in *Peebles v. Reading*, 8 Ser. & Rawle, 484, it is settled by more recent cases that a mere declaration by one that he is about to purchase land for another, without any previous arrangement, will not raise a trust for the benefit of the latter. To work such an effect, the purchase must be in pursuance of a prior agreement, founded in a sufficient consideration; or the means of the making the purchase, or at least some portions of it, must be furnished by him who claims to be the *cestui que trust*. The doctrine in which these kinds of parol trusts are founded is so fully treated of in *Kisler v. Kisler*, 2 Watts, 323; *Robertson v. Robertson*, 9 id. 36; *Sidle v. Walters*, 5 Watts, 389; *Haines v. O'Conner*, 10 Watts, 313, and kindred determinations, that a simple reference to them is sufficient.

"It is true a previous agreement to purchase in trust, or the fact that the purchase-money proceeded from the party setting up the trust, may be established by the oral declarations of the actual purchaser. This is the extent to which the cases have gone, and it has been justly observed, that to push the doctrine of parol confidence beyond this, would operate a *pro tanto* repeal of the Statute of Frauds and Perjuries."

The law upon the subject is finally settled in *Morey v. Herrick*, 18 Pa. St. 128 (1851), in which it is said that as the part of the English Statute of Frauds, which prohibits the parol declaration of a trust, was not transferred to the Pennsylvania Statute on the same subject, an express trust in lands might be orally declared. But, after some vacillation of decision, or rather of *dicta*, which for a time unsettled the professional mind, it is agreed that a simple

a trust.(r) The fraud against which a court of equity will relieve by enforcing a contract notwithstanding the Statute of Frauds, consists in the repudiation of an agreement upon the faith of which an innocent party has been misled to his injury, and not in the mere moral wrong in the repudiation of a contract which, by reason of the Statute of Frauds, cannot be enforced.(s) Thus, where the bill set up a trust in favor of S., who was a deaf mute and the defendant in an execution upon which the property was sold, it being arranged between him and

avowal of acquisition for the use of another, whether made contemporaneous with or subsequent to the fact, will not of itself support an allegation of trust. Yet it is equally well settled that if one be induced to confide in the promise of another that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne, or to forbear what he contemplated to do in the acquisition of an estate, whereby the promisor becomes the holder of the legal title, an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio*.

In this case the facts were that Herrick, the defendant, was assignee through *mesne* conveyances from J. P. who, under an arrangement with Morey, the plaintiff's ancestor, bought land at public sale, each agreeing to pay half the price and own half the land; arranging also that the price of the land should be paid at the time of the sale by J. S. B., according to the custom which required at these sales the notes of third parties to be given. Morey afterwards paid more than half the price, and he and J. P. treated the arrangement as executed. It was held that the assignees of J. P. could not disturb it, as under the circumstances for J. P. to take the land after inducing Morey not to buy for himself, under a

promise to hold for him, would have been a fraud, and as at any rate a resulting trust arose from the payment of the price. *Morey v. Herrick* is commented upon in *Kellum v. Smith*, 33 Pa. St. 164.

(r) In *Kellum v. Smith*, *supra*, it is said, a promise to buy in at sheriff's sale for the defendant in the execution, and allow him to redeem, is within the Statute of Frauds, and is not a resulting trust, which can only arise from the payment of purchase-money, or fraud in the purchase. The payment and the fraud, if subsequent to the purchase, will not create a resulting trust, and breach of the parol agreement is not such fraud; citing *Roberts*, p. 165. It is also said that in *Brown v. Dysinger*, 1 Rawle, 413, the fraud was in getting the land at a low price, by pretending to buy it for the debtor, and that that is a misunderstood case which is well explained in *Haines v. O'Conner*. *Morey v. Herrick* does not conflict with *Jackman v. Ringland*, 4 W. & S. 149, where the trust was created by a participation in the purchase, and by payment of part of the price; the remarks of the judge as to fraud raising a trust were not called for, as every parol contract of sale within the Statute of Frauds involves a certain amount of confidence, which is broken by the breach of the contract.

(s) *Burden v. Sheridan*, 36 Ia. 125.

K. and G. at the time of the sale, that K. should buy for S.'s benefit. At the sale, K. not being present, G. bought, the title being taken in K.'s name, who paid the purchase-money; but it was held, in the absence of evidence showing fraud, that the trust was not made out.(t)

But on the other hand, where the alleged trustee was one of several tenants in common, and took the conveyance to himself of an outstanding title, while it is said that the mere declaration of a vendee that he intends to buy for another, without evidence of any previous agreement to do so, or of any advance of money for the purpose, raises no trust which can be supported in equity, yet the court compels the defendant, the alleged trustee, to hold as a trustee for the benefit of the other tenants in common, allowing him to use the deeds of the outstanding titles purchased in his own name as security only to enforce contribution for the money paid for them.(u)

§ 824. Again, the rule as to the breach of mere agreements involving no fraud is applied in cases in which implied trusts are not raised when a purchase is made by an alleged trustee with his own money, though it had been agreed at or before the time of the purchase that the alleged *cestui que trust*, upon paying the purchase-money or his share, should be allowed the benefit.(v)

Purchase-money belonging to the alleged trustee.

§ 825. And it is noticed that when the breach of contract has

(t) Kistler's App., 73 Pa. St. 397.

(u) Lloyd v. Lynch, 28 Pa. St. 423; and as to the breach of an agreement made upon buying at sheriff's sale to pay the execution debtor's debts, see Norris v. Knox, 1 Pitts. Pa. 56.

(v) Walter v. Klock, 55 Ill. 362; Farnham v. Clements, 51 Me. 426; Perry v. McHenry, 13 Ill. 227; Blair v. Bass, 4 Blackf. 545; Williams v. Brown, 14 Ill. 200; Holmes v. Holmes, 44 Ill. 168; Reeve v. Strawn, 14 Ill. 94; Holida v. Shoop, 4 Md. 465. In Hoge v. Hoge, 1 Watts, 163, it was held that where a devise was alleged to be a trust, the fraud must have been in the procuring of the devise, and not merely in

refusing to carry out the trust. That mere breach of a parol agreement will not constitute fraud so as to raise an implied trust, see Fox v. Heffner, 1 W. & S. 372; Haines v. O'Conner, 10 Watts, 313; Kellum v. Smith, 79 Pa. St. 158; Smith v. Smith, 27 Pa. St. 180; Williard v. Williard, 56 Pa. St. 124; Johnston v. Lamotte, 6 Rich. Eq. 347; Walter v. Klock, 55 Ill. 362; Levy v. Brush, 45 N. Y. 589. In Rasdall v. Rasdall, 9 Wis. 379, it was held that the mere refusal of a grantee to execute a parol agreement to hold real estate in trust for the grantor is not such a fraud as will justify the admission of parol evidence of the agreement.

Generally
breach of
agreement
is not an ex-
press but a
constructive
trust.

given rise to a trust, it has been generally treated as a constructive trust; but if the contract to hold for another was made before or was the means by which the legal title was procured, it is more properly an express trust which, when provable by parol, is so for special reasons.^(w) And where the agreement was that the alleged trustee should take the legal title, but should take it in trust, the trust is express.^(x) The trust does not arise on the mere agreement, but on the conveyance of the property for which the trust assumed was the sole consideration; and in one case, in which the express trust was permitted to be proved, it was raised not so much because of the fraud in the original acquisition of the property, as in the subsequent refusal to execute the trust.^(y)

(w) *Fischli v. Dumarealy*, 3 A. K. Marsh. 23; *Fowke v. Slaughter*, 3 A. K. Marsh. 57; *Hertle v. McDonald*, 2 Md. Ch. Dec. 128; *Peebles v. Reading*, 8 S. & R. 484; *Sample v. Coulston*, 9 W. & S. 62; *Norris v. Laberee*, 58 Me. 260; *Hall v. Shultz*, 4 Johns. 244; *White v. Carpenter*, 2 Paige, Ch. 238; *Walker v. Brungard*, 13 Sm. & M. 723; *Irwin v. Ivers*, 7 Ind. 308; *Hovey v. Holcomb*, 11 Ill. 660; *Lear v. Chouteau*, 23 Ill. 39; *Ratliff v. Ellis*, 2 Ia. 59.

(z) In *Burt v. Wilson*, 28 Cal. 632, there was a contract which was held not to create a trust either express or implied. See also *Whiting v. Gould*, 2 Wis. 552, where the complainant contracted by deed with W. to buy real estate for cash, and to build houses and a furnace in eighteen months. The houses were built, but the furnace remained unfinished, and the complainant's title to the lots passed to J., subject to his contract with W., and finally the title to the lots came to the defendant, G. It was held that there was no trust express or implied in the complainant's favor, whose contract with W. gave him but a chose in action, and until he had finished building the furnace there was nothing upon which equity would compel specific performance.

(y) *Matthews v. Leaman*, 24 Ohio St. 623. As to mere breach of agreement to purchase at sheriff's or judicial sales for another, in cases where bidding was prevented, see *Lamborn v. Watson*, 6 Harr. & Johns. 253; *Heath's App.*, 100 Pa. St. 1; *Hunt v. Elliott*, 80 Ind. 245; *Fricke v. Magee*, 10 W. N. C. 50 (C. P. Phila.) Land of A. was sold under legal process, and purchased by B., who took title in his own name and verbally promised to hold it in trust for his wife's benefit when paid the amount of his bid, and also certain other sums due by A. to B. Before this sale B. stated that he would purchase for his wife, and consequently he obtained the property for less than its value. Mrs. A. took possession of the land and retained it until sold under execution against B., when it was purchased by C. with full notice of these facts. It was held that no time having been specified for Mrs. A. to make the payments, and no demand made by B. for compliance, the contract remained of force, and C. having notice was bound by its terms. The change of possession was sufficient to take the agreement out of the Statute of Frauds; and the representation made by B. was calculated to stifle competition,

§ 826. But if there was no contract that the holder of the legal title should take title, and he fraudulently or mistakenly did so, any trust which may be raised is treated under the head of constructive trusts. It would seem that the distinction between cases of trusts founded upon express parol contracts and permitted to be proved by parol for special reasons, and the cases of trusts not founded upon such a contract, is an unimportant one, so far as both classes of cases are exceptions to the Statute of Frauds and provable by parol. In examining the reports, however, an attempt was made to keep the distinction in mind for the purpose of classification and arrangement. But difficulty has been met with in the statements of the facts; and unless the statement of the case plainly showed the existence of an express parol agreement, it was assumed for the purpose of classification that no such agreement existed. The distinction of express trusts provable by parol is to be applied in the cases of (I.) payment; (II.) fraud in obtaining property cheap under a promise to allow redemption; (III.) and to purchases upon joint account.

Distinction
in case of
pre-existing
contract.

§ 827. I. Payment. Where one person takes title for which another pays the price, parol evidence to prove the fact and establish a trust in favor of the person paying is always admissible, whether the title was taken as it was by agreement or not. The subject of payment is treated under the head of constructive trusts; it having been found unsatisfactory to attempt to keep the distinction whether title was taken in pursuance of a prior agreement, the fact not being mentioned in the reports. It is to be borne in mind, however, that where such an agreement really does exist, the trust is, in fact, express; and that payment is allowed to be shown is because it is an exception under which parol evidence is admitted, in violation of the general rule that writing is required in proof of express trusts.⁽²⁾ Where it has been decided that no constructive trusts arise from the misapplication by a trustee of trust funds, it was held that an express trust only could be created, which must be proved by writing.^(a)

Express
trusts arising
from
payment.

but no one objected in the court above;
Coney v. Timmons, 16 So. Car. 378.

(2) See *Constructive Trusts*, vol. 3,
§ 906.

(a) *Deg v. Deg*, 2 P. Wms. 412; *Nab
v. Nab*, 10 Mod. 404; *O'Hara v. O'Neil*,
7 Bro. P. C. 227; *Ryall v. Ryall*, 1
Atk. 59.

§ 828. II. Fraud which consists of the breach of an agreement when it is a trust at all, gives rise to an express trust.^(b)
 Fraud. For instance, in cases of fraud in obtaining property cheap under a promise to allow redemption.

§ 829. Thus, where the holder of the legal title gets the land at public sale by discouraging bidding through an announcement that he is bidding in for the original owner, no distinction is taken generally between the cases where there was a previous contract to buy in trust for such previous owner, and where there was not; for this reason, and because in such a case a trust may also be raised (if necessary) for the creditors, with whom there was no express contract, this subject is placed under the head of constructive trusts. But it is to be remembered that for the purpose of classification some of these cases also (if the fact of the existence of a previous agreement is shown in the statement of facts) would more properly appear under the head of express trusts; that the trusts were allowed to have been proved being an exception to the rule. The proof is not allowed, it may be here also noted, unless the owner is slackened in his exertions to find a purchaser; and there must be fraud and actual discouragement of bidding, as where the person interested was induced to stay away from the sale. But a mere declaration by the purchaser that he was bidding is an express trust (if any), and not provable by parol unless the bidding was discouraged.^(c)

§ 830. III. So the right of one of several purchasers on joint account is held to be an express trust.^(d) But at the time when an absolute conveyance of land was made in discharge of an existing indebtedness, the vendee verbally agreed to reconvey the land to the vendor, if he would repay the consideration, but the vendee refused to have this verbal agreement embodied in the writing; and in a suit by the vendor to have the land sold, and claiming the excess of what the land

(b) See *supra*, §§ 823 *et seq.* & B. 484; *Sample v. Coulson*, 9 W. & S. 62; *Norris v. Laberee*, 58 Me. 260;
 (c) See *Constructive Trusts*, § 937 *et seq.* *Hall v. Shultz*, 4 Johns. 244; *White v. Carpenter*, 2 Paige, Ch. 238; *Walker v. Brungard*, 13 Sm. & M. 723; *Irwin v. Ivers*, 7 Ind. 309; *Hovey v. Holcomb*, 11 Ill. 660; *Lear v. Chouteau*, 23 Ill. Ch. Dec. 128; *Peebles v. Reading*, 8 S. 39; *Ratliff v. Ellis*, 2 Iowa, 59.

might sell for above the original consideration, the evidence failed to show that at the time the conveyance was made the consideration paid was not the fair value of the land; or that the parol agreement was omitted by mistake in reducing the contract to writing; or that there was any other fraud than in the breach of the parol contract; it was held, therefore, that there was no trust and the Statute of Frauds applied.^(e) Where A. promised to convey land to B., who promised to pay a judgment against A., and B. failed to pay the judgment and bought the land at sheriff's sale, it was held that there was no resulting trust in favor of A., but that the trust was express, and being by parol could not be enforced; and that a promise upon no new consideration after the sheriff's sale gave no additional validity.^(f) The interest which one of several purchasers of land has to take off timber during his life cannot be treated as a resulting trust, but is an express trust and invalid by parol.^(g) And an express trust, if proved, to redeem land sold for public dues and to hold for the original owners, is invalid if by parol.^(h) It would seem, moreover, that where A. gave B. a lease, and B. declared in writing that the lease was in trust for A., and B. afterwards surrendered the lease and A. gave a new lease to C., who executed no written declaration of trust, there was no resulting trust in favor of A.; also that no implied trust can exist between a lessor and lessee, but only an express trust, which must be declared by writing.⁽ⁱ⁾

§ 831. But a trust implied by law from certain facts is not brought within the Statute of Frauds, and these facts may be proved by parol evidence.^(j) In one of the cases, after deciding that where one pays the purchase-money and another takes title a resulting trust arises, it was held

Proof of facts
raising trust.

(e) *Harper v. Harper*, 5 Bush, 176; *Martin v. Martin*, 16 B. Mon. 8, being distinguished, and *Thomas v. McCormack*, 9 Dana, 109, being quoted for an excellent rule as to when in such cases equity will interfere. See *Ensley v. Balentine*, 4 Humph. 233; *Burt v. Wilson*, 28 Cal. 632, a case where no trust at all was held to arise.

(f) *Smith v. Smith*, 27 Pa. St. 180.

(g) *Dow v. Jewell*, 21 N. H. 470.

(h) *Sherrill v. Crosby*, 14 Johns. 361.

(i) *Pilkington v. Bayley*, 7 Bro. P. C. 383. In *Riddle v. Emerson*, 1 Vern. 108, *query* whether a lease to A., but by parol agreed to be in trust for A. and B., and B. paying half the rent, could be set up by parol; but it would seem that it could.

(j) *Farrington v. Barr*, 36 N. H. 88; *Moore v. Moore*, 38 N. H. 382; *Church v. Sterling*, 16 Conn. 402; *Moore v. Wade*, 8 Kan. 380; *White v. Sheldon*, 4 Nev. 280.

that the fact that the party receiving a conveyance of land agreed at the time with the person paying the consideration that the former should execute a conveyance to the latter of the premises does not make the trust an express, as distinguished from one implied by law from the acts of the parties, so as to exclude proof of it by parol under the Statute of Frauds.^(k) And where the title of land bought by A. and B. is taken in the name of A. a resulting trust arises, and the character of the trust is not altered by an express verbal agreement or by a declaration of A. that he holds the land subject to such trust; a trust implied by law from a given state of facts is not brought within the Statute of Frauds so as to be required to be proved by written evidence, by the declaration of the trustee that he holds subject to such trust.^(l) But no parol agreement between the parties giving to an implied trust a different effect or character from that which the law would raise from the acts of the parties could be admitted in evidence, for that would be to create an express trust.^(m)

§ 832. Having considered, therefore, the divisions into which trusts have been made, and the distinction as to the mere The rule. breach of an agreement, and cases which are held to be express trusts, and also having noted the exceptions in the case of express trusts, which will be hereafter more fully considered, we come now to the rule which, under the Statute of Frauds, requires them to be proved by a writing.⁽ⁿ⁾

(k) *Bayles v. Baxter*, 22 Cal. 578.

(l) *McDonald v. McDonald*, 24 Ind. 68, discussing the cases.

(m) *White v. Sheldon*, 4 Nev. 280. In *Norris v. Laberee*, 58 Me. 260, where a conveyance is made subjecting the grantee to a personal liability only arising from the acceptance of a deed-poll, it will not be reformed on the ground of mistake, so as to create an express trust binding the land conveyed, the Statute of Frauds applying.

(n) A full collection of the cases in the different States would be useless, but in regard to the rule generally the following cases may be referred to: *Reid v. Mobile*, 70 Ala. 199; *Larned v. Tritch*, 6 Col. 433; *Rogers v. Sim-*

mons, 55 Ill. 76; *Miller v. Blackburn*, 14 Ind. 62; *Knaggs v. Mastin*, 9 Kan. 547; *Fischli v. Dumaresq*, 3 A. K. Marsh. 23; *McClellan v. McClellan*, 65 Me. 504; *McElderry v. Shipley*, 2 Md. 26; *Northampton Bank v. Whiting*, 12 Mass. 104; *Black v. Black*, 4 Pick. 234; *Davis v. Wetherill*, 11 Allen, 19 (n.); *Buck v. Dowley*, 16 Gray, 557; *Flint v. Sheldon*, 13 Mass. 448. In Michigan, between 1810 and 1847, *Ready v. Kearsley*, 14 Mich. 224; *Wentworth v. Wentworth*, 2 Minn. 283; *Walker v. Locke*, 5 Cush. 92; *Culligan v. Wingert*, 57 Mo. 242; *Dow v. Jewell*, 18 N. H. 353; *Hall v. Congdon*, 55 N. H. 104; *Hopkinson v. Dumas*, 42 N. H. 296; *Claffin v. French*, 28 N. J. Eq. 383; *Frey v. Ransom*, 66

§ 833. In the States in which no Statute of Frauds has been enacted, express trusts are provable by parol. In Pennsylvania, prior to 1856 :*(o)* in North Carolina :*(p)* in Michigan, between 1810 and 1847 :*(q)* in Mississippi, prior to the Revised Code :*(r)* in Virginia and West Virginia, where the seventh and eighth sections of 29 Car. II. were not enacted, but only the fourth section somewhat modified :*(s)* in Rhode Island :*(t)* in Ohio, where the seventh, eighth, and ninth sections were omitted, and third and fourth sections adopted :*(u)* and so in Texas :*(v)*

Exceptions.

N. Car. 466; *Sime v. Howard*, 4 Nev. 485. After 1856, in Pennsylvania, *Rider v. Maul*, 46 Pa. St. 376; *Kistler's App.*, 73 Pa. St. 397; *Whiting v. Gould*, 2 Wis. 594; *Lamb v. Vaughn*, 2 Sawy. 175; *Ingham v. Burnell*, 2 Pac. Repr. 804; *Howland v. Blake*, 97 U. S. 624; *Allen v. Withrow*, 3 Sup. Ct. Repr. 517; *Lloyd v. Spillet*, 3 P. Wms. 344; 2 Atk. 150; *Barn. 384*; *Carey v. Ley*, *Tothill*, *Holb. ed.*, 95; *Willis v. Willis*, 2 Atk. 71; *Altham v. Anglesea*, 11 Mod. 214; *Seckler v. Fox*, 16 No. W. Rep. 246 (Mich.)

(*o*) *German v. Gabbald*, 3 Binn. 303; *Miller v. Pearce*, 6 W. & S. 97; *Peebles v. Reading*, 8 S. & R. 491; *Robertson v. Robertson*, 9 Watts, 34; *Kisler v. Kisler*, 2 Watts, 324; *Morey v. Herrick*, 18 Pa. St. 128; *Randall v. Silverthorn*, 4 Pa. St. 177; *Swartz v. Swartz*, 4 Pa. St. 358.

(*p*) *Olcott v. Bynum*, 17 Wall. 59; *Foy v. Foy*, 2 Hayw. 131; *Shelton v. Shelton*, 5 Jones, Eq. 294.

(*q*) *Ready v. Kearsley*, 14 Mich. 224.

(*r*) *Anding v. Davis*, 38 Miss. 594.

(*s*) *Bank of United States v. Carrington*, 7 Leigh, 576; *Sprinkle v. Hayworth*, 15 Am. L. Reg. 36, 26 Gratt. 684; *Walraven v. Locke*, 2 P. & H. 547; *Nease v. Capehart*, 8 W. Va. 104.

(*t*) *Quære Cranston v. Smith*, 6 R. I. 231.

(*u*) *Miller v. Stokeley*, 5 Ohio St. 197; *Mathews v. Leaman*, 24 Ohio, 623.

(*v*) *James v. Fulcro*d, 5 Tex. 514,

citing as to the rule at common law prior to the Statute of Frauds, *Foy v. Foy*, 2 Hayw. 131; 4 Kent, 305; *Wil. on Trustees*, 46; 2 Story, Eq. § 372; 2 Fonblanque, Eq., bk. 2, ch. 2, § 4, n. 16; *Bailey v. Harris*, 19 Texas, 108; *Miller v. Thatcher*, 9 id. 482; *Mead v. Randolph*, 8 id. 198; *Grooms v. Rust*, 27 id. 234; *Leckey v. Gunter*, 25 id. 403; *Millican v. Millican*, 24 id. 440; *Thomas v. Hammond*, 47 id. 49; *Agricultural Assn. v. Brewster*, 51 id. 257. In *Withers Appeal*, 14 S. & R. 185, there was a *dictum* of Judge Duncan to the effect that the omission in Pennsylvania of the seventh and eighth sections of 29 Car. II. was of no consequence, as by implication parol express trusts were prohibited by the first section, on the ground that as an express trust is an interest or estate in land, it cannot under the first section be created by parol. This *dictum* was overruled in *Murphy v. Hubert*, 7 Pa. St. 423, *Gibson, C. J.*, saying, that the only authorities to the effect that parol express trusts are not valid in Pennsylvania, are mere *dicta*; that the omission of the seventh and eighth sections was conclusive on the point, the transcriber of the Pennsylvania statute having done his work in a masterly manner; that the arguments against parol express trusts will prove too much, and parol implied trusts would also have to be held invalid, inasmuch as the proviso in their favor is in the eighth section which is not in force (*quære*, however,

§ 834. Uses before the 29 Car. II. c. 3, might have been by parol, and since the statute they may be declared by a writing unseal-

whether this proviso is not merely declaratory of the common law: *Hoxie v. Carr*, 1 Sumn. C. C. 173; *Browne on Statute of Frauds*, § 84; and that misconceptions would arise if English decisions based on a different statute were too closely followed. *Freeman v. Freeman*, 2 Pars. Eq. 85, following *Murphy v. Hubert*, cites a large number of cases on the subject, and shows that many of the cases cited as denying parol express trusts were decided on the ground, not that the evidence was in parol, but because it was generally insufficient to establish a trust: see cases cited in *Freeman v. Freeman*, and see, also, *Kirkpatrick v. M'Donald*, 11 Pa. St. 387; *Randall v. Silverthorne*, 4 id. 173; *Swartz v. Swartz*, Id. 353; *Wetherel v. Hamilton*, 15 id. 198; *Lloyd v. Carter*, 17 id. 220; *Morey v. Herrick*, 18 id. 128; *Tritt v. Crotzer*, 13 id. 455. In Pennsylvania, since April 22d, 1856, express trusts cannot be proved by parol: *Barnet v. Dougherty*, 32 Pa. St. 371. In *Meason v. Kaine*, 63 Pa. St. 339, Judge Sharswood said that the *Murphy v. Hubert* line of cases had, he believed, always met with the dissatisfaction of the profession, till the Act of 1856 did away with the effect of them; and consult a review of that case by Horace Binney, Esq., published in 1848. In *Church v. Ruland*, 64 Pa. St. 442, it was held, citing English and Pennsylvania cases, that trusts *ex maleficio* are not within the Act of 1856. By the sixth section of the Act of 22d April, 1856, trusts excepted from the provisions of the statute must be asserted within a certain time. In *Clark v. Trindle*, 52 Pa. St. 495, said Thompson, C. J., speaking of the section, "It will (when the verbiage, &c., is taken out) read '*That no right of entry shall accrue or action be maintained* * * *

to enforce any implied or resulting trust as to really but within five years after * * * *such equity or trust accrued with right of entry, unless such* * * * *trust shall have been acknowledged by writing to subsist by the party to be charged thereon within the same period.'* The words 'with right of entry,' at the end of the clause, I esteem as material to be considered in construing it. The expression evidently means, I think, if there be neither entry nor possession taken by the party in whose favor the trust results, within five years after it accrues, and no acknowledgment in writing, the trust cannot thereafter be asserted in law against the trustee;" see *Best v. Campbell*, 62 Pa. St. 478, for an application of this ruling. In *Williard v. Williard*, 56 Pa. St. 124, it was held where possession has been taken by the alleged *cestui que trust* under his title (the words of the act being " * * * unless * * * there has been in part a substantial performance"), that if the act had begun to run, possession taken would stop it; and if possession preceded the trust relation, the statute would not begin to run; citing *Clark v. Trindle*, 52 Pa. St. 492 (*query*, whether, however, possession existing to a contract or trust can be regarded as part performance to save the transaction from the operation of the statute); *Jones v. Peterman*, 3 S. & R. 543; *Farley v. Stokes*, 1 Pars. Eq. Cas. 422; *Cravener v. Bowser*, 4 Pa. St. 259; *Aitkin v. Young*, 12 id. 15; *Christy v. Barnhart*, 14 id. 260; *Greenlee v. Greenlee*, 22 id. 237; *Myers v. Byerly*, 45 id. 368; *Workman v. Guthrie*, 29 id. 495; *Brown on Statute of Frauds*, § 477 *et seq.* See, however, as examples of cases where a prior possession continued after the contract made was held under the circumstances to be part performance:

ed;(w) on the other hand, it has been held that no use could arise without a deed.(x) And if a stranger levied a fine of a rent, he could not limit the use to a stranger without a deed.(y) The Statute of Frauds does not prevent parol evidence being admitted to rebut the presumption of a resulting trust in favor of the conusee of a fine which arises where no uses have been regularly declared.(z) But it has been said that uses equally with trusts were within the Statute of Frauds, and could not be taken by a stranger by a parol averment; and that under a fine and recovery the use does not result to the conusor and his heirs, but by a parol averment may pass to the conusee and his heirs, and generally according to the intention the use must pass to the conusee.(a) But it may be added that prior to the Statute of Frauds a parol declaration of uses was not valid where there was already a deed declaring the uses.(b) Where a deed to lead the uses of a fine is levied and the fine is different, parol evidence of an intervenient agreement as to the uses is admissible.(c)

In the United States the question whether uses and trusts were

Aurand v. Wilt, 9 Pa. St. 54, and *Moss v. Culver*, 64 id. 424.

In *Church v. Ruland*, 64 Pa. St. 444, where A. received a devise of land for life, subject to the trust that she should leave the land to B. in her will, it was held that the limitation of the sixth section of act of 1856 did not run against B. till A.'s death; see also *Price's Appeal*, 54 Pa. St. 472; and that the act is not retrospective; *Ballentine v. White*, 77 Pa. St. 25; *Lingenfelter v. Ritchey*, 58 Pa. St. 485.

(w) *Shortridge v. Lamplough*, 7 Mod. 76. As to the effect of the Statute of Frauds upon uses and trusts as at common law, see *Wright v. Cadogan*, 2 Eden, 256; *Fordyce v. Willis*, 3 Bro. C. C. 587; *Perry on Trusts*, §§ 73 *et seq.*; 2 *Sand. Uses and Trusts*, 1-8; *Hill on Trustees*, 55; 2 *Story, Eq. Jur.* § 971.

(x) *Foster v. Foster*, Sid. 82, pl. 9; 22 *Vin. Abr.* p. 208; *Co.* 27, pl. 1.

(y) *Parvis v. Yeaton*, 22 *Vin. Abr.* p. 209, pl. 3; *Roll. Rep.* 72, pl. 15; see

Fisher v. Fields, 10 Johns. 506; *Getman v. Getman*, 1 Barb. Ch. 504.

(z) *Roe v. Popham*, 1 Doug. 24.

(a) *Lord Altham v. Earl of Anglesey*, Gilb. Eq. Rep. 17. In *Bushel v. Burland*, 11 Mod. 197, *query* by Holt, C. J., whether uses even since the Statute of Frauds may not be declared by parol, though trusts cannot; as to how far uses are valid by parol without feoffment, see 2 *Rolle's Abr.* 788; *Collard v. Collard*, Poph. 49, Moore, 687, where possession taken seems to constitute the validity of the parol use declared. See note to *Chibborne's Case*, Dyer, 229 a, as to whether before the Statute of Frauds a use could be raised by parol, with cases cited. In *Anon.*, 1 Keble, 281, it was held that uses could be declared by parol before 29 Car. II. c. 3. See as to averring uses by parol, *Tregame v. Fletcher*, 2 Salk. 676.

(b) *Stapilton v. Stapilton*, 1 Atk. 7.

(c) *Jones v. Morley*, Holt, 321; *S. C.* 1 *Ld. Ray.* 287; affirmed on appeal, by

valid by parol at common law is not of great practical importance ; since the provisions of the Statute of Frauds were enacted at an early period by the legislatures of the several States.(d)

§ 835. But the rule requiring written proof of express trusts does not require, in most of the States, that the creation of the trust shall also be by writing, and express trusts may therefore be created by parol.(e) In New York,

May create
trust by
parol.

the House of Lords, *Show. Pr.* 140 ; see for full arguments of counsel. In *Finch's Case*, 4 *Inst.* 86 (see § 14, n. g), it was held that if a man makes a conveyance and expresses a use the party himself, or his heirs, shall not be received to aver a secret trust other than the express limitation of the use, unless such trust or confidence appears in writing, or is otherwise declared by some apparent matter.

(d) For a collection of the decisions upon the subject in Ohio, Connecticut, and Pennsylvania, see *Perry on Trusts*, § 75.

(e) *Trapnall v. Brown*, 19 *Ark.* 47 ; *Miller v. Cotton*, 5 *Ga.* 340 ; *Kirkpatrick v. Davidson*, 2 *Ga.* 297 ; *Kingsbury v. Burnside et al.*, 58 *Ill.* 330 ; *McIntyre v. Skinner*, 4 *G. Greene (Iowa)*, 91 ; *Second Unitarian Society v. Woodbury*, 14 *Me.* 287 ; *Evans v. Chism*, 18 *Me.* 220 ; *Hertle v. McDonald*, 2 *Md. Ch. Dec.* 128 ; *Albert v. Winn*, 5 *Md.* 66 (distinguishing the case of a contract relating to the sale of land, in which case it was said that the contract must have been in writing) ; *Maccubin v. Cromwell*, 7 *Gill & J.* 163 ; *Safford v. Rantoul*, 12 *Pick.* 233 ; *Cornelius v. Smith*, 55 *Mo.* 528 ; *Lane v. Ewing*, 31 *Mo.* 75 ; *Sime v. Howard*, 4 *Nev.* 473 (citing *Cruise, Dig. I.*, p. 421 ; *Sanders' Uses and Trusts, I.*, p. 343 ; *Hill on Trustees*, p. 87 ; *Adams' Eq. p.* 28 ; *Kent Com. IV.* 343 (10th ed.) ; *Story, Eq. Jur. II.*, § 972 ; *Willard's Eq.* 413 ; *Bonner's, II.*, § 1902 ; *Washburne on R. P. II.*, p. 191 ; *White v. Fitzgerald*, 19 *Wis.* 489 ; *Brown v. Lunt*, 37 *Me.* 423 ; *Siemon v. Schurek*, 29 *N. Y.* 598 ; *Wright v. Douglass*, 7 *N.*

Y. 564, and other cases), and denying *Judge Willard's dictum contra (Willard's Eq. Jur. p.* 414) ; *Coombs v. Brown*, 5 *Dutch.* 39 ; *Smith v. Howell*, 3 *Stockt.* 349 ; *Whelan v. Whelan*, 3 *Cow.* 580 ; *Steere v. Steere*, 5 *Johns. Ch.* 11 ; *Moran v. Hays*, 1 *Johns. Ch.* 342 ; *Cur v. Barr*, 44 *N. Y. (5 Hand)* 159, in which it was shown that the New York statute first provided that trusts must be created by a writing, and that then by an amendment it was provided that they need only be so proved (citing 4 *Kent*, 305 ; 1 *Cruise, Dig. Greenliff. title* 12, chap. 1, §§ 36 and 37, p. 390 ; *Tiffany & Bullard on Trusts*, §§ 353, 355) ; *Jackson d. Prim v. Moore*, 6 *Cow.* 725 ; *Norris v. Knox*, 1 *Pitts.* 56 ; *Brown v. Brown*, 1 *Strobh.* 363 ; *Cumberland v. Graves*, 9 *Barb. S. C.* 595 ; *Rutledge v. Smith*, 1 *McCord, Ch.* 119 ; *Reid v. Reid*, 12 *Rich. Eq.* 213 (*S. C.*) ; *Grooms v. Rust*, 27 *Tex.* 234 ; *Pinney v. Fellows*, 15 *Vt.* 539 ; *Taft v. Tafts*, 3 *Wood & Min.* 476. In *McClellan v. McClellan*, 65 *Me.* 504, it is said that there is no clause relating to trusts in the Maine statute of 1821, c. 53 ; but under stat. 1827, c. 358, parol trusts could be created but not proved by parol. "In the revision of 1841, c. 91, § 31, the original section, so far as it related to express trusts, was condensed, and all trusts concerning lands must be created and manifested by some writing signed. It seems the terms 'created and manifested' were considered as working a most important change in the law that trusts must be created by writing, and

however, under 2 R. S. 135, § 6^{ga} writing is necessary even to create an express trust ;(f) so in Wisconsin ;(g) and in Maine under Rev. St. ch. 91, § 31.(h) In California also the trust must be created by a writing ; but it need not appear on the face of a deed, and any note in writing of the nominal purchaser admitting the fact is sufficient.(i) Where an express trust cannot be created by parol,

that it was not sufficient that they were subsequently admitted, acknowledged, or declared in writing ; *Richardson v. Woodbury*, 43 Maine, 206. But in the revision of 1857, c. 73, § 11, the particular phrase mentioned was changed to 'created or declared.' It is the same in the revision of 1871, c. 73, § 11. The court held, however, citing many cases, that "the change of the revision of 1841, from 'created and manifested' to 'created or declared,' was more than a mere change of phraseology, and preceding as it did the construction given in *Richardson v. Woodbury*, we think the marked change of language evinced an intention on the part of the legislature to change the law as there decided, and that such a change was wrought so that under the existing statute, as under the first, express trusts may be 'created' in the first instance, or subsequently declared by any proper writing signed as required. In fact they frequently originate in the verbal negotiations of parties, and whenever they do so arise, and are proved by some writing signed by the party or his attorney, whether it be contemporaneous with, or prior or subsequent to, the principal transaction, the authorities all concur in declaring the statute complied with in this respect." In *Urann v. Coates*, 109 Mass. 585, it is said that the law, as declared in some of the Massachusetts cases, "is to be found mainly in decisions under the words of the English statute, which requires that all declarations and creations of trust shall be manifested or proved in writing. These were the words of our earlier

law (St. 1783, c. 37, § 3), and they remained until the first general revision of the statutes, the requirement of the present statute being that the trust shall be created or declared in writing ; Gen. Sts. c. 100, § 19. The same change has been made in other States, and in those in which the question has been incidentally before the courts, the tendency is to rule that this abbreviation in the words does not change the law, and that 'created or declared' are equivalent to 'manifested or proved.' Trusts may be created in the first instance in writing ; they more commonly originate in the oral agreements and transactions of the parties, and are subsequently declared in writing. Our statute embraces both descriptions. It had been settled by repeated decisions under the old statute when this change was made, that an express trust was sufficiently declared, if shown by any proper written evidence disclosing facts which created a fiduciary relation. Under this construction the additional words of the old statute seem immaterial, and are omitted. And we are of opinion that no change in the meaning or effect of it was intended or made." *Perry on Trusts*, § 81, and several cases were cited. As to the parol disclaimer or acceptance by a trustee being valid, see *Godefrois' Law of Trustees*, p. 10.

(f) *Cook v. Barr*, 44 N. Y. (5 Hand) 159.

(g) *Whiting v. Gould*, 2 Wis., 593, citing *Bellasis v. Compton*, 2 Vern. 295.

(h) See *Richardson v. Woodbury*, 43 Me. 206.

(i) *Osborne v. Endicott*, 6 Cal. 154.

oral evidence is not admissible to corroborate a writing evidencing the trust;(j) and in Pennsylvania, prior to 1856, though an equitable estate could be created by parol, and so proved, it could not be so assigned.(k)

§ 836. But in every case the written proof of an express trust may be executed subsequent to its parol creation.(l) The declaration may be made subsequent to the creation of the trust.(m) And a declaration of uses executed subsequent to a fine is a sufficient compliance with the Statute of Frauds,(n) even although the writing is long subsequent in date to the transaction.(o)

In the rule that the creation of a trust may be by parol, the interpretation of the seventh section of the statute has been said, in Georgia, to be different from that of the fourth, which requires agreements to be in writing and signed.(p)

(j) *Cook v. Burr*, *supra*.

(k) *Murphy v. Hubert*, 7 Pa. St. 420, considering Withers' Appeal, 14 S. & R. 185.

(l) *Sime v. Howard*, 4 Nev. 481; *Urann v. Coates*, 109 Mass. 585; *Reid v. Fitch*, 11 Barb. 406; *Kingsbury v. Burnside*, 58 Ill. 328, citing *Taney v. Crowther*, 3 Bro. C. C. 161; *O'Hara v. O'Neil*, 7 Bro. P. C. 227; *Barrell v. Joy*, 16 Mass. 223; *Rathbun v. Rathbun*, 6 Barb. 105; *Mathews v. Massey*, 4 Baxt. 458; *Smith v. Howell*, 3 Stockt. 354; *Safford v. Rantoul*, 12 Pick. 241, citing the cases.

(m) *Stapilton v. Stapilton*, 1 Atk. 7; *Forster v. Hale*, 5 Ves. Jr. 313.

(n) *Bushel v. Burland*, 11 Mod. 197, citing cases. That the written evidence of the trust may either precede or follow the creation of the trust, see *Bragg v. Paulk*, 42 Me. 510; *Jackson d. Erwin v. Moore*, 6 Cow. 725, citing 2 Ves. 696, 5 Johns. Ch. 12; *Cuyler v. Bradt*, *Caines' Cases*, 324; *McLaurie v. Partlow*, 53 Ill. 345; *Barrell v. Joy*, 16 Mass. 223; *Maccubin v. Cromwell*, 7 Gill & J. 563; *Riggs v. Swann*, 6 Jones, Eq. 120; *Shelton v. Shelton*, 5 Jones, Eq.

292; *Sime v. Howard*, 4 Nev. 483; *Williard v. Williard*, 56 Pa. St. 124.

(o) *Reid v. Reid*, 12 Rich. Eq. 213. In *Smith v. Howell*, 3 Stockt. 349, the deed by which the alleged trust was created was executed at a certain time; the declaration of trust was signed ten years afterwards; this was held good. In *Johnson v. Delaney*, 35 Tex. 42, admissions of the nominal purchaser that he purchased the land with the money of the plaintiff were held to be admissible, even after the purchaser's death, though the fact that the plaintiff waited till the death of the purchaser to assert his claim was considered a circumstance of weight.

(p) *Robeson v. Harwell*, 6 Ga. 596, where it is said that the statute does not even declare a contract for a parol trust in lands void; it only declares that unless trusts in lands are manifested and proven in writing they shall be void. In this particular the seventh section of the statute is essentially different from the fourth; the former declares a rule of evidence only, and recognizes a parol declaration of trusts in land to be legal, if it can be set up by

§ 837. The written evidence of an express trust must be clear, the best attainable, and show the terms of the trust;(q) but proof of the trust need not be made in writing when a voluntary acknowledgment can be shown.(r) Especially must it be clear after the lapse of time,(s) and loose and equivocal expressions are not sufficient.(t)

Character of written evidence required.

§ 838. In the cases in which an express trust is permitted to be proved by parol being so, as it has been seen, for some special reason, as payment, fraud, &c., the strength of parol evi-

Character of parol evi-

written evidence subsequently furnished. In *Randall v. Morgan*, 12 Ves. Jr. 71, which was a case relating to an agreement to marry requiring a writing, Sir William Grant, M. R., says: "Supposing, however, that this letter refers to some parol promise before the marriage, I doubt extremely whether that would be sufficient to entitle the court to construe this into an acknowledgment of a debt; for the promise being in itself a nullity, producing no obligation, a written recognition after the marriage would give it no validity. Otherwise the construction of the fourth section of the statute would be just the same as the seventh, which requires only that a trust shall be manifested by writing. Upon that clause it is not necessary that the trust shall be constituted by writing. It is sufficient to show by written evidence the existence of the trust. But the fourth clause requires the very agreement to be in writing and signed by the party to be charged therewith."

But it has been already seen that some of the cases hold that under the seventh section trusts cannot be even created by parol; *Osborne v. Endicott*, 6 Cal. 149; *Ratliff v. Ellis*, 2 Ia. 59; *Kirkpatrick v. Davidson*, 2 Ga. 297; *Hopkinson v. Dumas*, 42 N. H. 303; *White v. Sheldon*, 4 Nev. 280.

(q) *Miller v. Stokeley*, 5 Ohio St. 196.

(r) *McIntire v. Skinner*, 4 G. Greene, 91.

(s) *Crissman v. Crissman*, 23 Mich. 218; *Mead v. Randolph*, 8 Tex. 198.

(t) *Mercer v. Stark*, 1 Sm. & Mar. Ch. 487; *Steere v. Steere*, 5 Johns. Ch. 12; *Homer v. Homer*, 107 Mass. 86; *Smith v. Matthews*, 3 DeG. F. & J. 139; 4 L. T. N. S. 266; 26 W. R. 142; *Kronheim v. Johnson*, 37 L. T. (N. S.) 751; 7 Ch. D. 60. In *Olliffe v. Wells*, 130 Mass. 221, where a testator devised the residue of his estate "to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him," and appointed A. his executor; it was held that the devisee took no beneficial interest in the devise, but the trust on its face was too indefinite to be carried out; that it could not be established against the heirs or next of kin of the testator by evidence of parol communications made to A. by the testator, whether before or after the execution of the will, showing that the trust was for charitable purposes, but that the heirs or next of kin took by way of resulting trust. But in *Montgomery v. Montgomery*, 2 Hawaiian, 567, where a deed was made reserving by a written agreement the benefit to the grantor, the Statute of Frauds does not apply, and the trust can be proved against the defendant's denial, but there must be clear and strong evidence; and a trust being established by oral evidence, such evidence is also admissible to define it.

dence re- the parol evidence required, is of the highest degree;
quired, and great caution is used that the proof shall be clear
when so and positive. For instance, in States where the Statute
provable. of Frauds is not in force.(u) Or where the trust is one as to per-
sonalty.(v) Or in cases where there was payment or fraud,(w)
especially where the land has since risen in value.(x) In one case
it has been said that the evidence of a declaration made by the
defendant, the holder of an absolute title to land, avails nothing,
for, although parol declarations of tenancy have been received
with certain qualifications, parol proof has never been admitted to
destroy or take away title; to allow parol evidence to have that
effect would be introducing a new and most dangerous species of
evidence; the Statute of Frauds, which has been considered the
Magna Charta of real property, avoids all estates created by parol
and all declarations of trust, excepting resulting trusts, regarding
any lands.(y)

And in another case it was said that the rule as to the amount
of evidence necessary to prove a trust, which in Texas can be
proved by parol, in relation to implied trusts, might doubtless be
applied advantageously to the proof of express parol trusts; and
such evidence must be clear and satisfactory, and such as could be
reasonably attainable under the circumstances of the case.(z)
Proof that a vendor and the agent of the vendee understood a
purchase to be in trust, but that the vendee himself did not so un-
derstand it, is insufficient to establish the trust against the ven-
dee.(a)

(u) Nease v. Capehart, 8 W. Va. 104;
Markham v. Carothers, 47 Tex. 27,
where it is said, however, that the ex-
pression that the evidence shall be be-
yond a reasonable doubt is not appro-
priate.

(v) Dipple v. Corles, 11 Hare, 184;
Barkley v. Lane, 6 Bush, 589; Maguire
v. Dodd, 9 Ir. Ch. 456; Crissman v.
Crissman, 23 Mich. 218.

(w) Sprinkle v. Hayworth, 15 Am. L.
Reg. 36; Kistler's App., 73 Pa. St. 397;
Norris v. Knox, 1 Pitts. Pa. 56; Brown
v. Dysinger, 1 Rawle, 413.

(z) Haines v. O'Conner, 10 Watts, 320.

(y) Jackson v. Cary, 16 Johns. 302.

(z) Mead v. Randolph, 8 Tex. 198.
See Kingsbury v. Burnside et al., 58 Ill.
328, for an example of evidence held
sufficient to prove a trust.

(a) Harris v. Barnett, 3 Gratt. 339.
See *In re Dunbar*, 2 Jones & Lat. 120,
for evidence, *semble*, insufficient to estab-
lish a trust; Chiles v. Woodson, 2 Bibb,
72, for proof of trust held insufficient,
the Statute of Frauds being set up in an
answer; and Crissman v. Crissman, 23
Mich. 218, Miller v. Stokely, 5 Ohio
St. 196, for examples of trusts insuffi-
ciently proved.

§ 839. As to the evidence which has been held to be sufficient, sometimes it is said that the parol declarations of the holder of the legal title are enough; (b) but proof of parol declarations of deceased trustee should be clear and preponderating, and be corroborated. (c) And parol acknowledgments of facts which imply a trust are also admissi-

Parol declarations of holder of legal title.

(b) *Poulet v. Johnson*, 25 Ga. 403; *Collins v. Smith*, 18 Ill. 160; *Peabody v. Tarbell*, 2 Cush. 226; *Calder v. Movin*, 49 Mich. 14; *Moore v. Moore*, 38 N. H. 387; *Jackson v. Cary*, 16 Johns. 302; *Malin v. Malin*, 1 Wend. 652; *Williard v. Williard*, 56 Pa. St. 124; *Hoge v. Hoge*, 1 Watts, 163; *Lloyd v. Carter*, 17 Pa. St. 220; *Peebles v. Reading*, 8 S. & R. 491; *Norris v. Knox*, 1 Pitts. Pa. 56; *Taylor v. Mayrant*, 4 Desaus. 515. But see contra, *Conwell v. Evill*, 4 Blackf. 67; *Aborn v. Burnett*, 2 Blackf. 101; *Baumgartner v. Guessfeld*, 38 Mo. 36; *Jackson v. Cary*, 16 Johns. 302; *Tritt v. Crotzler*, 13 Pa. St. 45; citing *Brown v. Dysinger*; *Pierce v. McKeeshan*, 3 Pa. St. 136; *Harrisburg Bk. v. Tyler*, 3 W. & S. 373. But see *Babcock v. Wyman*, 19 How. 299; *Campbell and Catron, JJ.*, dissenting. Although by statute a parol trust in lands is void, yet the trustee may recognize it, and other persons whose equities are not affected thereby cannot interfere, and the admission of the trust by a brother, in an answer in chancery, is a sufficient declaration of the trust in writing to answer the requirements of the Statute of Frauds; see *Patton v. Chamberlin*, 44 Mich. 5. So if a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation so made by the grantor, the trustee is bound by the declaration and designation as completely as if the deed and declaration of trust were simultaneous and part of one and the same transaction; *Ireland v. Geraghty*, 11 Biss. 465, where the

parents of a child four months old made a deed conveying to the child certain property, and although it may be impossible to make an actual delivery to an infant, yet the grantors, in order to make the deed valid, must in some way manifest an intention to deliver it and make it effective; and where such a deed was never recorded or published or ever afterwards alluded to by either of the parents as a consummated transaction, but was found after their death among the papers of the father, it was held that the deed was inoperative to pass title. The court say that a trust is definite enough to be valid if there is sufficient certainty in the terms of the declaration to enable a court of equity, in case the trustee should neglect or refuse to execute the trust, to take possession of the trust through its own trustee or receiver, and execute the trust and carry out the wishes and intentions of the donor. Notwithstanding the Iowa Code, § 1934, relating to declarations of trusts in writing, a trust alleged by the beneficiary thereof and admitted by the party named in the conveyance as trustee, may be enforced, though the beneficiary be not named therein; and one who purchases from a trustee with knowledge of the trust takes the property subject thereto; *Sleeper v. Iselin*, 17 N. W. Rep. 922 (Iowa).

(c) *McCammon v. Pettit*, 3 Sneed, 242; *Neill v. Keese*, 5 Tex. 23; *Hood v. Bowman*, 1 Freem. Ch. 290; *Vandever v. Freeman*, 20 Tex. 333; *Johnson v. Quarles*, 45 Mo. 423; *Johnson v. Delaney*, 35 Tex. 42.

ble.(d) A mere declaration of one that he purchased for another without any previous agreement or without an advance of money, raises no trust which equity will support; but in Pennsylvania, since the act of April 22d, 1856, as before, declarations of the alleged trustee amounting to a confession made at any time are competent evidence of the trust.(e) And in a case where A. furnished money and B. bought the lands, and after A.'s death B. made a declaration of trust, it was held, that a claim by A.'s widow to recover her share of the purchase-money under the custom of London *quâ* widow was not good, but that the title to the real estate in A. was sufficiently proved by B.'s declaration.(f)

§ 840. Having considered, therefore, the enactments in the several States similar to the 29 Car. II. c. 2, and the kind, nature, and degree of parol evidence required in cases in which express trusts are provable by parol, we return to the rule under the Statute, and consider the character of the written evidence of express trust required thereunder.

§ 841. In the first place, there is no prescribed form of words for a declaration of trust, and any informal written memoranda are sufficient.(g) If the declaration clearly and with certainty in writing sets forth the objects, terms, conditions, and nature of the trust, and is made by the

(d) *Rutledge v. Smith*, 1 McCord, Ch. 119, citing *Randall v. Morgan*, 12 Ves. 67; *Crook v. Brooking*, 2 Vern. 50; *Thynn v. Thynn*, 1 Vern. 296, Eq. Cas. Abr. 380; *Strickland v. Aldridge*, 9 Ves. 516; *Moore v. Moore*, 38 N. H. 387; *Kisler v. Kisler*, 2 Watts, 324, where it is said that parol evidence is admissible of admissions by a grantee of certain facts from which the law raises a trust, not however of the contract on the part of the grantee; *Peebles v. Reading*, 8 S. & R. 491, being questioned. In *Letcher v. Letcher*, 4 J. J. Marsh. 592, it is said when the question is whether the law will imply a trust from the facts in a given case, it is not improper to show from his declarations the intent of the party laying out the

money; see also *Miazza v. Yerger*, 53 Miss. 139. In *Lowry v. Smith*, 9 Hun, 516, transactions out of which a trust arises may be proved by parol, but the trust itself must rest upon the acts and situation of the parties as proved.

(e) *Williard v. Williard*, 56 Pa. St. 124.

(f) *Ambrose v. Ambrose*, 1 P. Wms. 322. See *Hollinshead v. Allen*, 17 Pa. St. 235, for memoranda and admissions by alleged trustee held to be competent evidence of a trust.

(g) *Porter v. Bank of Rutland*, 19 Vt. 419; *Wright v. Douglass*, 7 N. Y. 569; *Pratt v. Ayer*, 3 Chandler, 265; *Pratt v. Thornton*, 23 Me. 360; *Throop v. Hatch*, 3 Abb. 29.

party legally entitled to make it, it will be sufficient; no matter what be the character of the document which contains it. Accordingly a bond to assign as the *cestui que trust* shall direct or a covenant to convey to specified uses, or recitals in a deed, statements in a bill or answer, or in letters or notes in the handwriting of the party, have been held sufficient.^(h) For sufficient written memoranda generally see the cases in the note,⁽ⁱ⁾ and as a rule, a writing, however informal, made by the grantee upon the receipt of the conveyance of an absolute estate, will satisfy the provisions of the Statute.^(k) And where a deed recites that a purchase was intended to be made, it gives notice to persons taking thereunder of the trust, which the terms of the purchase so recited gave rise to;^(l) and any note or memorandum or answer in equity will suffice.^(m)

Thus where A., a soldier entitled under a resolution of the legislature to have a bounty of land, wrote and sealed on the back of a discharge which he had received, that B. was entitled to all the lands which he, A., was entitled to, from the State for his, A.'s, services as a soldier; it was held that A.'s claim was a mere equitable one, and the assignment or declaration of trust was sufficient under the Statute of Frauds, it not being an agreement relating to the sale of lands but an assignment.⁽ⁿ⁾ And a writing signed promising to declare a trust is a sufficient declaration of trust to satisfy the statute.^(o) So where A. conveyed land in fee to B. and took from B. a writing not under seal, setting forth that B. had paid A. a certain sum of money (not the full value of the estate),

(h) *Gordon v. Green*, 10 Ga. 541, citing 2 P. Wms. 314; 2 Vern. 167; 2 Bro. P. C. 250; 2 P. Wms. 412; 1 Com. & Law, 15; 2 Vern. 288; 3 Sim. 385; 7 Bro. P. C. 227; 3 Vesey, 707; 2 N. C. C. 67; Hill on Trustees, 61; *Kirkpatrick v. Davidson*, 2 Ga. 297. See §§ 335, 328.

(i) *Osborne v. Endicott*, 6 Cal. 154; *Buckner v. Kingsbury*, 58 Ill. 310; *Kingsbury v. Burnside*, 58 Ill. 328; *Bates v. Hurd*, 65 Me. 180; *Chadwick v. Perkins*, 3 Me. 399; *Buck v. Swazey*, 35 Me. 48; *Bragg v. Paulk*, 42 Me. 510; *McClellan v. McClellan*, 65 Me. 504; *Faxon v. Folvey*, 110 Mass. 394; *Arms*

v. Ashley, 4 Pick. 71; *Aynesworth v. Haldeman*, 2 Duv. 571; *Hutchinson v. Tindall*, 2 Green's Ch. 358; *Fisher v. Fields*, 10 Johns. 495; *Cuyler v. Bradt*, *Caines' Cases*, 334; *Movan v. Hays*, 1 Johns. Ch. 342; *Wright v. Douglass*, 3 Seld. 569; *White v. Fitzgerald*, 19 Wis. 485; *Parish v. Parish*, 32 Beav. 207.

(k) *Barrell v. Joy*, 16 Mass. 223.

(l) *Cuyler v. Bradt*, *Caines' Cas.* 334.

(m) *Bragg v. Paulk*, 42 Me. 510; *Buck v. Swazey*, 35 Me. 41, and *Pratt v. Thornton*, 28 Me. 360, being cited.

(n) *Fisher v. Fields*, 10 Johns. 495.

(o) *Bellamy v. Burrow*, *Cas. Temp. Talb.* 97.

and had taken a deed, and that B. had agreed to let A. "have the improvement or sell, provided he should pay the above sum of money in three years;" it was held that this, under Massachusetts decisions, was not a mortgage but a declaration of trust.(p) Or if the holder of a note, endorsed to him as security for a debt due him by the assignor, obtains judgment against the maker of the note, and issues execution thereon and then signs a writing, not under seal, to pay the plaintiff, the assignor, all the rents of the land taken in execution after his the assignee's debt is paid, or to allow the plaintiff the use of the land, this is a sufficient declaration of trust, and the rents can be recovered in *assumpsit* for money had and received.(q)

A declaration of trust will be sustained where the trust is declared by a writing executed and delivered, the declaration of trust accompanying and being of the same date with the absolute deed in the same matter, although the declaration is not executed at the same time and place as the deed, but being dated on the same day and being the consideration of the deed, the two instruments will be considered as part of the same transaction and be construed together.(r) And an absolute deed and a contemporaneous deed declaratory of the trusts to which the property was intended to be subject, will constitute one transaction.(s) Besides it is enough if there is a recognition if not a declaration of a present existing trust by the trustee; or if the intention is that the donee is not to have the beneficial enjoyment of the property;(t) but an instrument of trust is fatally defective which does not indicate the *cestui que trust*.(u)

The memorandum must be signed but need not be subscribed,(v) and where there are several memoranda, and one of them is signed, it is sufficient;(v') but in one case the fact that the memorandum

(p) *Scituate v. Hanover*, 16 Pick. 222; citing *Flint v. Sheldon*, 13 Mass. 448; *Barrell v. Joy*, 16 Mass. 221.

(q) *Arms v. Ashley*, 4 Pick. 71.

(r) *Ownes v. Ownes*, 23 N. J. Ch. 62.

(s) *Greenfield's Est.*, 14 Pa. St. 489; *Hamilton v. Elliott*, 5 S. & R. 384; *Cromwel's Case*, 2 Rep. 75, being cited.

(t) *Smith v. Wilkinson*, cited in *Foster v. Hale*, 3 Ves. 705, distinguishing

as stronger than *Bellamy v. Burrow*, *Gordon v. Gordon*, 10 Ga. 543, where something further was to be done.

(u) *Smith v. Matthews*, 3 DeG. F. & J. 139; *Dillaye v. Greenough*, 45 N. Y. 445; *Steel v. Steel*, 4 Allen, 422; *Abuel v. Radcliffe*, 13 Johns. 300.

(v) *Smith v. Howell*, 3 Stockt. 354;

(v') *McClellan v. McClellan*, 65 Me. 305.

was not signed because of the fraudulent act of one of the parties in interest, was no reason to take the case out of the Statute of Frauds; and where some of several parties on one side sign and others of them do not, none are bound by it.^(w) But an imperfect deed may be sufficient to declare a use.^(x) And a deed signed by the vendor and by A. for the firm of A., B. & C., it appears is insufficient as a deed, but not as a memorandum of trust under the statute.^(y) Nor is it necessary that the beneficiary of a declaration of trust shall be a party to it.^(z) And it would seem that a memorandum, especially where there has been an antecedent parol contract raising a trust, need not be delivered to be valid;^(a) and informal memoranda are sufficient compliance with the statute, even as against a deed.^(b)

§ 842. Such memoranda as are contained in letters are sufficient.^(c) But they must clearly express the property to be in trust, and sufficiently connect the trustee with the subject-matter of it. They may, however, be long posterior to the transaction in date. And in some cases it has been held that they shall be from the alleged trustee, but on the other hand, letters addressed to or written by strangers to the transaction are sufficient.^(d) Speaking of a trust and writing letters which evidence it is sufficient, though the vendee refused to declare the trust;^(e) but

Or letters.

(w) *Gilbert v. Trustees of East New-ark*; 1 Beasley, Ch. 203.

(x) *Anon.*, 1 Keble, 281 (14 Car. II.)

(y) *Kyle v. Roberts*, 6 Leigh, 495.

(z) *Dale v. Hamilton*, 2 Phill. 274.

(a) *Urann v. Coates*, 109 Mass. 581; *Arthur v. King*, 8 Pitts. Leg. Jour. 114. In *M'Fadden v. Jenkyns*, 1 Hare, 461, as to the difference between an ordinary declaration of trust, and an assignment to the person claiming the beneficial interest in regard to the degree and method of proof, see the Vice-Chancellor's opinion.

(b) *Barron v. Barron*, 24 Vt. 375.

(c) *Delawrencel v. De Boom*, 48 Cal. 581; *Peraltro v. Castro*, 6 Cal. 358; *Robson v. Harwell*, 6 Ga. 589; *Frost v. Frost*, 63 Me. 399; *Lewis v. Gray*, 1 Mass. 304; *Packard v. Putnam*, 57 N. H. 50; *Coombs v. Brown*, 5 Dutch. 39; *Campbell v. Taul*, 3 Yerg. 558; *Smith v.*

Wilkinson, cited in *Forster v. Hale*, 3 Vesey, 705; *Morton v. Tewart*, 2 Yo. & Coll. Ch. 76; *Woodroff v. Johnston*, 4 Ir. Ch. 319; *Smith v. Mathews*, 3 DeG. F. & J. 139; 4 L. T. N. S. 266. See § 328.

(d) *Childers v. Childers*, 1 DeG. & J. 482, where the plaintiff, wishing to qualify his son as bailiff under the Bedford Level Act, which required the bailiff to hold four hundred acres in the level, wrote and signed a letter to the registrar asking the latter to arrange this matter; the son died without being informed of the fact that the father had conveyed to him the property; it was held that the letter was a sufficient memorandum, though written by the plaintiff, and that the transaction not being fraudulent or illegal, it could have succeeded without the letter.

(e) *Forster v. Hale*, 5 Ves. Jr. 313.

letters addressed to others than the equitable claimant are less valuable as evidence.(f) And it is insufficient if a letter, signed by initials, is addressed to the alleged *cestui que trust* by the alleged trustee and does not declare a trust, though the same envelope incloses a separate sheet of paper marked "supplement," but which is unsigned;(g) and a letter stating an intention to allow redemption of land is also insufficient.(h)

But where a tenant unable to pay his rent surrendered his lease to his landlord, and his brother-in-law, stating in letters signed that he wished to assist the former tenant's family, obtained the residue of the lease, it was held that as to the expenditures put upon the property by the former tenant, and which the new tenant obtained by the sub-lease he held in trust for the family of the former tenant;(i) or where A. agreed for a lease, and B. advancing money to pay the fine took the lease in his own name, it was held that letters of B. were sufficient proof of the trust to comply with the Statute of Frauds;(j) or where A. received a conveyance which is really in trust, became bankrupt, and afterwards assigned the property so conveyed to him by a deed in which he recited that the previous conveyance had been in trust; it would seem that this was a sufficient memorandum of the trust under the statute, together with certain letters between the parties.(k) And in one case the wife of the alleged trustee in a deposition identified a letter written by herself and signed with her husband's name, the alleged trustee, in his presence and by his direction, and in answer to a letter received from the alleged *cestui que trust*, mentioning how uneasy the latter was about her Enfield property, and requesting

(f) *Steere v. Steere*, 5 Johns. Ch. 12, citing *O'Hara v. O'Neil*, 2 Bro. P. C. 39; *Forster v. Hale*, 3 Ves. 696.

(g) *Kronheim v. Johnson*, 26 W. R. 142; 37 L. T. N. S. 751; 7 Ch. D. 60.

(h) *Linton v. Wikoff*, 17 La. Ann. 878.

(i) *Morton v. Tewart*, 2 Yo. & Coll. 67.

(j) *O'Hara v. O'Neil*, 7 Bro. P. C. 227. See *Rutledge v. Smith*, 1 McCord, Ch. 119, that a letter is a sufficient memorandum of an express trust; that a voluntary acknowledgment will dispense with written proof; so also an acknowledgment of facts which point

to no other conclusion than a trust; citing *Randall v. Morgan*, 12 Ves. 67; *Crook v. Brooking*, 2 Vern. 50; *Thynne v. Thynne*, 1 Vern. 296; 1 Eq. Ca. Abr. 380; *Strickland v. Aldridge*, 9 Ves. 516. In *Kingsbury v. Burnside*, 58 Ill. 328, it was held that under the peculiar wording of § VII. of the Statute of Frauds relating to trusts, letters, notes, and memoranda were sufficient even when made after the trust, citing *Tawney v. Crowther*, 3 Bro. Ch. R. 161, 318; *O'Hara v. O'Neil*, 7 Bro. P. C. 227.

(k) *Gardner v. Rowe*, 2 Sim. & Stu. 352.

the alleged trustee to convey it to her; the letter of the alleged *cestui que trust* was not produced, but the parol evidence of the alleged trustee's wife was used in connection with the letter written in answer, and other facts and circumstances, to prove the trust.^(l) In another case a letter was held to be sufficient either as a declaration of trust or as a contract of partnership.^(m)

§ 843. A promissory note is also sufficient writing to comply with the statute.⁽ⁿ⁾ Or a note given by a husband to his wife for money paid by her to him out of her separate estate.^(o) A written promise to execute a declaration of trust is also a good memorandum.^(p) Or a memorandum

Or promissory notes.

(l) *Packard v. Putnam*, 57 N. H. 50; where the court say of the letter in answer to that of the alleged *cestui que trust* (Mrs. Packard); that the trustee's letter in reply "having been signed by her in his name in his presence and by his direction, is a memorandum in writing, signed by the party sought to be charged, sufficient to answer the requirements of the Statute of Frauds. This memorandum refers to Mrs. Packard's letter, and to what she has said about her property, tells her not to worry about it, distinctly recognizes that the property is hers, and promises to convey it at her pleasure. The memorandum in question distinctly admits, taken in connection with the plaintiff's letter, that the property was hers, was in Enfield, and that the title stood in the name of Putnam, and promises to convey it to Mrs. Packard on request. It is apparent, both from the bill and answer, that the intestate at the time of his decease held the title to no other real estate in Enfield, and this fact is sufficient to identify the property mentioned in the memorandum. If it were necessary that a consideration should appear for the agreement, the fact admitted in the memorandum that the property belonged to the plaintiff would perhaps answer this require-

ment." The memorandum was held sufficient as identifying the property.

(m) *Montague v. Hayes*, 10 Gray, 611, where the written evidence was: "The agreement between Mr. Montague and myself is simply this: we have purchased an estate of F. C. Head and T. Motley, Jr., on Washington street, which has by mutual consent been conveyed to me (I having paid and secured the purchase-money); whatever disposition is made of the property, the profit and loss is to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect."

(n) *Murray v. Glasse*, 23 L. J. Ch. 126; *Smith v. Darby*, 39 Md. 268, where a single bill was made at the direction and dictation of the alleged trustee, although not signed by him. See § 331.

(o) *Murray v. Glasse*, *supra*. In *McC Campbell v. McC Campbell*, 2 Lea, 661, a note executed by a husband to his wife during coverture in consideration of money collected by him on a chose in action payable to the wife on distributive share due her, will, upon satisfactory proof of intention, constitute a declaration of trust in favor of the wife which equity will enforce, the estate being solvent and rights of creditors not involved.

(p) *Morton v. Tewart*, 2 Yo. & Coll.

Other writings. invalid under other sections of the Statute of Frauds, for not showing a consideration.(g) And a statement contained in a writing addressed to a third person is not invalid.(r) As where, in an application for the residue of a lease, the writer stated the application to be for the benefit of the equitable claimant.(s) And in general any memorandum for whatever purpose executed.(t) As, for instance, an acknowledgment by a trustee that he had bought with the funds of the trust estate,(u) although the writing may not have been intended to declare a trust.(v) And besides the beneficiary need not be a party to the declaration.(w) And a deed separately executed, showing the trust of another deed, is enough;(x) as by a lease and release,(y) or a mortgage,(z) or by a bond executed contemporaneously with the absolute deed, being regarded as one transaction.(a)

67; *Bellamy v. Burrow*, Cas. Temp. Talb. 97.

(g) *Corse v. Leggett*, 25 Barb. 389. But in *Thompson v. Branch*, 1 Meigs, 390, an unsealed written acknowledgment or memorandum by a party holding the legal title that another is interested in a certain number of acres, did not raise a trust to convey it without proof of a consideration paid to the party making the acknowledgment, the court saying that a trust cannot be implied, except upon proof of a consideration.

(r) *Morton v. Tewart*, 2 Yo. & Coll. 67.

(s) *Morton v. Tewart*, *supra*.

(t) *Hutchinson v. Tindall*, 2 Green, Ch. (N. J.) 362; *Pant Mawr Slate Co. v. Fleming*, 20 Scot. L. R. 307. See § 324.

(u) *Deg v. Deg*, 2 P. Wms. 412; *Johnson v. Delaney*, 35 Tex. 42; *Pierce v. McKeenan*, 3 Pa. St. 136; citing *Harrisburg Bk. v. Tyler*, 3 W. & S. 373. In *Ryall v. Ryall*, 1 Atk. 59, it was held that the answer of an executor that he had used the assets of an estate to buy land with, would be sufficient to do away with the objection of the Statute of Frauds, and let in parol proof; but an answer by the executor's administrator admitting certain matter in the executor's account, did not do more than

furnish ground for an inquiry into the alleged resulting trust.

(v) *Hutchinson v. Tindall*, 2 Green, Ch. 358. In *Dale v. Hamilton*, 2 Phill. Ch. 275, the defendants signed a declaration recognizing the plaintiff's right in certain land; that he was to have no control or management over the land, but that they were to sell the land and account to him for the profits. The Chancellor (Cottenham) held that, the defendants having repudiated any trust for the plaintiff, the court would assume the discretion which the defendants should have exercised for the plaintiff, and order the land to be sold, saying that "it would be the strangest thing in the world if, the statute being satisfied, which it is by finding this writing signed by the parties, the court should not give relief to the party whom that document declares entitled to it."

(w) *Dale v. Hamilton*, 2 Phill. 274.

(x) *McLaurie v. Partlow*, 53 Ill. 345; *Goodwin v. Cutler*, Finch, 856; *Stapilton v. Stapilton*, 1 Atk. 7; *Bushell v. Burland*, 11 Mod. 197.

(y) *Stapilton v. Stapilton*, *supra*.

(z) *Johnson v. Caudage*, 31 Me. 28.

(a) *Gomez v. Tradesmen's Bank*, 4

§ 844. Moreover, a recital in a deed of the intention of the purchaser is sufficient notice of an express trust to those taking under the deed.(b) And knowledge that the vendor was under bond to convey to the equitable claimant, ^{As bonds, deeds, mortgages, &c.} has the same effect.(c) And this, though the trust was that the vendee should convey to the obligee in the bond on the same express trust on which he, the vendee, had bought.(d) Moreover, a recital in a deed that the grantor had held in trust for the grantee is good against the creditors of the former;(e) but an express trust need not be evidenced by a deed or specialty.(f)

So receipts for money for land, which was shown to be the land in contest, together with admissions by the alleged trustees, are sufficient in a case involving the rights of minors;(g) and a deed and

Sandf. 102; Greenfield's Est., 14 Pa. St. 489; citing *Hamilton v. Elliott*, 5 S. & R. 384; *Cromwel's Case*, 2 Rep. 75.

(b) *Cuyler v. Bradt*, Caines' Cas. 334; *Wright v. Douglas*, 7 N. Y. 569; *Shearer v. Loftin*, 26 Ala. 703, where it is held that a deed of trust which conveys land for the benefit of certain creditors, although it says it is tripartite, yet it need not be signed either by the trustee or the party to be benefited. See § 337.

(c) *Cloninger v. Summit*, 2 Jones, Eq. 513.

(d) *Id.*

(e) *Gardner v. Rowe*, 2 Sim. & Stu. 352.

(f) *Bragg v. Paulk*, 42 Me. 510; *Shortridge v. Lamplough*, 7 Mod. 76; *Wheeler v. Newton*, Prec. in Ch. (Finch) 16; *Beck d. Fry v. Phillips*, 5 Burr. 2831; (*Den d.*) *Mayberry v. Johnson*, 3 Green, N. J. 116. In *Wright v. Douglas*, 7 N. Y. 569, it is said: "Where an agent receives a conveyance of land absolute in form but really in trust to sell, and afterwards sells, and his deed recites that he holds in trust, it was held that the Rev. Stat. requiring express trusts to be proved by deed is satisfied. The statute prescribes no particular form

by which the trust is to be created or declared. Under our former statute, in relation to this subject, it was only necessary that the trust should be manifested in writing, and therefore letters from the trustee, disclosing the trust, were sufficient. Such is the law of England. (Stat. 29 Car. II., ch. 3, § 7; *Forster v. Hale*, 3 Ves. Jr. 696.) Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust; but it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and *cetui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other."

(g) *Miller v. Antle*, 2 Bush, 409. In *Acherley v. Acherley*, 7 Bro. P. C. 273, where A. lent money on mortgage on a copyhold estate, and being physically unable to do so had the surrender taken by B., who declared the trust in writing, it was held that when A. afterwards bought the equity of redemption and

a declaration of trust in the form of a mere memorandum made long after, taken together, in regard to partnership lands, is a sufficient declaration of trust, there being also evidence of payment.(h) A deed by a trustee under a trust to sell, which recites the trust, is a sufficient deed as required in New York;(i) and an unsealed declaration by the trustee that the trust was by deed, is sufficient to give jurisdiction to a court which had authority only over trusts by deed.(j)

Where the assignee of a note as security gets on execution land of the maker, an unsealed agreement to give the assignor the benefit of this acquisition, subject to the original debt, is a declaration of trust and not a conveyance.(k)

Besides, a complete divestiture of the equitable title may be done by a declaration of trust, although further disposition of the legal title was contemplated;(l) and an unsealed writing by an agent, in which he "sets" and "lets" land to several, among others his principal, is not a good lease, but is a good declaration of trust;(m) but a written declaration of trust is not such a conveyance as to require a United States stamp.(n)

§ 845. Sufficient memoranda of express trusts to satisfy the stat-

took the surrender through B. as before, who executed no declaration of trust, a trust would by law be declared against B. notwithstanding the Statute of Frauds.

(h) *White v. Fitzgerald*, 19 Wis. 488.

(i) *Wright v. Douglass*, 3 Seld. 564.

(j) *Safford v. Rantoul*, 12 Pick. 233.

As to the difference in the degree and method of proof between a declaration of trust in favor of and an assignment of conveyance to the person beneficially interested, see *McFadden v. Jenkyns*, 1 Hare, 461.

(k) *Arms v. Ashley*, 4 Pick. 71, citing *Barrell v. Joy*, 16 Mass. 221, though it recited no consideration. See, for a writing held to be a declaration of trust and not a mortgage, *Scituate v. Hanover*, 16 Pick. 222, citing *Flint v. Sheldon*, 13 Mass. 448; *Barrell v. Joy*, *supra*. In cases of gifts, as to how far a mere declaration of trust will pass title, see *Scales v.*

Maude, 6 DeG. M. & G. 43; *Kilpin v. Kilpin*, 1 M. & K. 520; *In re Curteis' Trusts*, L. R. 14 Eq. 217; and *Jones v. Lock*, L. R. 1 Ch. App. 28, where Lord Cranworth said that his own *dictum* in *Scales v. Maude*, that a valid declaration of trust could not be made in favor of a volunteer, was wrong, and added, "If I give any chattel that of course passes by delivery, and if I say expressly or impliedly that I constitute myself a trustee of personalty, that is a trust executed capable of being enforced without consideration." See *McElhinney v. Hope*, 1 W. N. C. 76, for parol evidence of a gift held to be insufficient under Statute of Frauds; and *Bentley v. Mackay*, 15 Beav. 12, as to what suffices to show a declaration of trust to constitute a gift.

(l) *Lane v. Ewing*, 31 Mo. 75.

(m) *Harker v. Birkbeck*, 3 Burr. 1563.

(n) *Sime v. Howard*, 4 Nev. 473.

ute may be contained in pleadings, depositions, &c., (o) or an answer of the trustee. (p) Especially when accompanied by parol evidence; (q) and where the Statute of Frauds is not set up. (r) And some of the decisions say that where the defendant's answer to a bill filed to enforce a parol trust in respect to land denies the existence of the contract alleged in the bill, the trust cannot be enforced, even though the defendant may have failed to set up in any way the Statute of Frauds. Such a trust can only be enforced where the defendant admits or at least does not deny the contract, and also does not plead the Statute of Frauds. (s)

So where the plaintiff sued in chancery for the reconveyance of real estate upon repayment by him of what purchase-money had been paid, and the defendant answered that the conveyance was absolute without power in the plaintiff to redeem, but confessed that it was agreed that after reimbursement of the purchase-money

(o) *Pinney v. Fellows*, 15 Vt. 539; *Olcott v. Bynum*, 17 Wall. 59; *Seaman v. Cook*, 14 Ill. 501; *McLaurie v. Partlow*, 53 Ill. 345. See § 335.

(p) *Reid v. Reid*, 12 Rich. Eq. 213; *Broadup v. Woodman*, 27 Ohio St. 553; *Elliott v. Morris*, Harper's Eq. 282; *Patton v. Chamberlin*, 44 Mich. 5. In *Peraltro v. Castro*, 6 Cal. 358, *Leman v. Whitley*, 4 Russ. 426, was distinguished as a case in which though the trustee had denied the writ by an answer, yet, having died, parol evidence was not admissible to contradict the deed in a suit by the grantor against the trustee's (the grantee's) devisee. See also *Muckleston v. Brown*, 6 Ves. Jr. 62; *McLaurie v. Partlow*, 53 Ill. 345; *Pinney v. Fellows*, 15 Vt. 538; *Barron v. Barron*, 24 Vt. 375; *Miller v. Thatcher*, 9 Tex. 483; *Hampton v. Spencer*, 2 Vern. 288. In *Broadup v. Woodman*, *supra*, where S. conveyed a tract of land to W. by a deed absolute in form, and subsequently a creditor of S. brought suit against him and W. to subject the land to the payment of his claim, W. answered in writing that he held the land in trust for the payment of certain spe-

cified debts of S. and for the support of his wife and child so far as necessary, and the creditor failed in his suit. It was held that the answer of W. in a former suit relating to the same land and deed in controversy was admissible to show the deed was one of trust.

(q) *Reid v. Reid*, 12 Rich. Eq. 213; *Kingsbury v. Burnside*, 58 Ill. 328.

(r) *Jones v. Slubey*, 5 Harr. & J. 382; *Jones v. Nabbs*, Gil. Rep. Ex. 146.

(s) *Metcalf v. Brandon*, 58 Miss. 841. In *Barron v. Barron*, 24 Vt. 375, it was held that an express trust, though raised against an absolute deed reciting no trust, is good if admitted in an answer in equity by the alleged trustee; and it would seem in *Ambrose v. Ambrose*, 1 P. Wms. 322, that if the holder of the legal title of certain lands which have been paid for by another is examined as a witness and acknowledges the trust, it would be sufficient to establish the trust. See *Freeman v. Tatham*, 5 Hare, 329, as to the effect of an admission of a resulting trust in an answer, and as to the mode of proving the facts and of examining the witnesses.

he had paid he should hold in trust for the plaintiff's wife and children; notwithstanding the plaintiff's objections to the effect that the confession should bind the defendant, but that the pretended trust, of which no proof was made, should be disregarded, the trust was declared in favor of the wife and children of the plaintiff.(t) So it has been held that the grantee may declare the trust in a separate deed or in an answer in chancery in a suit concerning the property to which the trustee is a party;(u) and where the answer of an alleged trustee admitted a parol direction of the testator to the alleged trustee, a legatee, whereby it was claimed a trust arose, the case was taken out of the statute; but as in the particular case there was no other proof of the trust than the answer aforesaid, the latter must be taken as a whole, and could not be impeached by other evidence.(v)

If an answer in equity shows a trust to be for a charity, the statute of mortmain will apply. And where a will recited a trust without describing it, and the trustees admitted that the testator, by a memorandum, described the trust to be for a charity, but answered that they held under the will and not for a secret trust, the express trust was held to be proved.(w) So where the misapplication of trust funds has been held not to give rise to a constructive trust, an express trust has been held sufficiently proved. And although an answer in equity as by an executor will be a sufficient memorandum, yet the answer of the executor's administrator is said to lay ground only for an inquiry.(x)

§ 846. And it is also sufficient if a writing without the formalities of a will set up a trust against a devise.(y) Thus a writing by

(t) *Hampton v. Spencer*, 2 Vern. 288. In *Hutchinson v. Tindall*, 2 Green, Ch. 358, it was held that a declaration of trust need not be formal, and if in writing and sufficiently ascertaining the terms of the trust, it is no matter that it was not made for such a purpose; that where a grantor files a bill claiming an absolute deed made without any consideration to be a trust, the defendant's answer admitting it was apparently good evidence and a sufficient writing; but that where, however, the grantor set aside the absolute deed on

the ground of the fraud, the defendant's answer setting up a trust (*Hampton v. Spencer*, 2 Vern. 288, being doubted) was not sufficient to overcome the plaintiff's claim.

(u) *McLaurie v. Partlow*, 53 Ill. 341.

(v) *Nab v. Nab*, 10 Mod. 404.

(w) *Adlington v. Cann*, 3 Atk. 141.

(z) *Ryall v. Ryall*, 1 Atk. 59.

(y) *Boson v. Statham*, 1 Eden, 511. *Pierce v. McKeahan*, 3 Pa. St. 136, citing *Harrisburg Bk. v. Tyler*, 3 W. & S. 373. See § 332.

a *cestui que trust* of a testamentary character has been held to be a sufficient declaration of trust;(z) and no declaration from the trustee is necessary under section seventh.(a) Moreover, a will executed by a *cestui que trust* will carry non-devisable copyholds where there had been a surrender to a trustee who had been admitted but who did not deny the trust;(b) and a writing void as a will is good as an appointment as to copyholds.(c) So where a son agreed by parol with his father to convey him a lot of land, and the father in consideration of this agreed also by parol with his son to devise him two other lots; and where the son conveyed, and the father devised, but his will was void as imperfectly executed; it was held that the son was entitled to specific performance, as the Statute of Frauds would otherwise cause a fraud, and that the will, imperfect as such, was good as a writing to satisfy the Statute.(d)

And writings in the nature of wills.

But on the other hand, a paper intended as a will and duly executed as such cannot be made a declaration of trust so as to operate as a will, and defeat the statute prescribing how the will of a married woman shall be executed, although her husband added in writing a promise to comply with its directions.(e) But if a testator bequeathed a legacy to A. and B., in trust for certain purposes, which the will says were fully explained to them, and on the same day a writing is signed by A. and B., in which they declare what the trust is; it is a valid declaration.(f)

§ 847. Book entries are also received as sufficient memoranda;(g)

(a) *Tierney v. Wood*, 19 Beav. 334; *Boson v. Statham*, *supra*.

(b) *Tierney v. Wood*, *supra*.

(c) *Wilson v. Dent*, 3 Sim. 388.

(d) *Attorney v. Barnes*, 2 Vern. 597.

(e) *Maddox v. Rowe*, 23 Ga. 433.

(f) *Long's App.*, 86 Pa. St. 196.

(g) *Smith v. Attersoll*, 1 Russ. 274.

In *Adlington v. Cann*, 3 Atkyns, 141, a writing subscribed by the testator indicating that the devisee under a previous will is to hold for a purpose referred to but not described, may be good as a declaration of trust, but is not a good revocation of devise, as such a memorandum requires witnesses. It was also said that the Statute of Mort-

main could not apply, as neither the writing aforesaid or the evidence established what, if any, was the charitable purpose, or how much of the estate was to go thereunder, and *Attorney-General v. Jones*, *Id. v. Lawson*, unreported, were cited that parol evidence under the Statute of Frauds cannot be admitted to prove a trust in order to prevent property escaping the Statute of Mortmain. See, for a full discussion of this point, *Wallgrave v. Tebbs*, 2 K. & J. 313.

(g) *Knight v. Pechey*, 1 Dick. Ch. 327; *Keller v. Kunkel*, 46 Md. 565; *Peraltro v. Castro*, 6 Cal. 358. See §§ 330, 340.

And book entries or pamphlets. but they must be definite and sufficient to determine what the land is, and indicate an intention in some way to hold the land in trust.(h) As well as also a report made by the committee of a lunatic to the Court of Chancery in writing, subscribed to and verified by oath, distinctly recognizing and declaring the trust;(i) or a pamphlet published and circulated by the alleged trustee, containing a statement of the trust.(j)

§ 848. If the written evidence establishes the existence of a trust, parol evidence in explanation of or for the purpose of describing what was meant, is admissible, or if the declaration of trust is imperfect, parol evidence may be used to complete it.(k) In a case, however,(l) where a letter addressed to a third person described no property and stated no consideration, parol evidence was inadmissible to assist the creation of the trust. But precisely how far parol evidence of the express trust is admissible to corroborate the writing, is extremely difficult under the cases to determine.(m) In one case a deposition, or pleading in equity, was held to be a sufficient declaration of trust; and then it appears, that the trust being shown to exist, its terms may be shown by parol, but the only parol evidence was of a declaration of the alleged trustee that he took the land knowing of the terms of a prior equity, which was proved by a writing signed by the previous person who had held the land on the trust now claimed.(n) And upon a bill for possession the plaintiff offered to read some books containing entries and receipts for £800 security, to show that the title which the defendant held was only borrowed, and that the deeds were lent to him so that he might become a member of Parliament, and that they were returned; the defendant set up the Statute of Frauds, but it was held that the evidence was admissible, as the intent of the Statute is to include trusts in part declared.(o) And

(h) *Homer v. Homer*, 107 Mass. 86; of the executors, and other proof, was used to show what was meant.
Tufts v. Tufts, 3 Wood & Minot, 476.

(i) *Reid v. Fitch*, 11 Barb. 406.

(l) *Campbell v. Taul*, 3 Yerg. 558.

(j) *Barrell v. Joy*, 16 Mass. 223.

(m) Some of the cases in which it was admissible are *Raybold v. Raybold*, 20 Pa. St. 308; *Massey v. Massey*, 20 Tex. 134; *Railroad Co. v. Durant*, 5 Otto, 576.

(k) *Kingsbury v. Burnside*, 58 Ill. 336; *Cagney v. O'Brien*, 9 Chic. Leg. News, 205, in the case of a will; *Pring v. Pring*, 2 Vern. 99, where the will making the declaration of trust did not mention for whom, but the confession

(n) *Reid v. Reid*, 12 Rich. Eq. 215.

(o) *Knight v. Pechey*, 1 Dick. Ch. 327.

it has been held that parol evidence of the general understanding of the parties in support of a deed, and against a trust set up against the deed, was admissible where the latter was not clear;^(p) but in any event, parol evidence to assist the written evidence is received with extreme caution.^(q)

§ 849. In some cases, evidence of declarations^(r) or of circumstances^(s) was allowed to be made. But, on the other hand, parol evidence of any kind to assist the written memorandum has been in other cases held to be altogether inadmissible; for instance, where under the New York statute trusts must be not only proved, but created by writing;^(t) but the rule under the Statute of Frauds does not prevent parol proof of lost declarations of trust.^(u)

As parol declarations,
etc.

In *Kingsbury v. Burnside et al.*, 58 Ill. 328, it was held that, without going the length of *Podmore v. Gunning*, 7 Sim. 654, inasmuch as the written evidence in the case clearly established the existence of a trust, parol evidence of words referred to in the written evidence was admissible for the purpose of describing or defining what was meant by the letter (the writing in question), and as showing the truth of the transaction.

(p) *Steere v. Steere*, 5 Johns. Ch. 12; see also *Miller v. Thatcher*, 9 Tex. 483, as to the measure of proof, citing several cases, and *Mead v. Randolph*, 8 Tex. 191, as a case where there was corroborative evidence, and the trustee was alive, and put in an unsworn answer denying the trust.

(q) *Sayre v. Frederick*, 1 C. E. Gr., 16 N. J. Eq. 205.

(r) *Leackey v. Gunter*, 25 Tex. 403; *Cuney v. Dupree*, 21 Tex. 217, citing *McClenny v. Floyd*, 10 Tex. 159; *Blyholder v. Gilson*, 18 Pa. St. 134; *Letcher v. Letcher*, 4 J. J. Marsh. 592.

(s) *Barron v. Barron*, 24 Vt. 375; *Kingsbury v. Burnside et al.*, 58 Ill. 328; *Steere v. Steere*, 5 Johns. Ch. 12, citing the cases; *Moore v. Pickett*, 62 Ill. 160, where the defendant bought the

plaintiff's lands as his agent, but took the title in his own name, and a letter from the defendant describing the transaction, but not describing the land, was a sufficient declaration of trust under the Statute of Frauds, as the facts and circumstances identified the land. In *Plymouth v. Hickman*, 2 Vern. 167, a trust was allowed to be proved by the surrounding circumstances of the case, although there was no express declaration of trust, and although the deed recited the consideration to have been paid by the nominal purchaser.

(t) *Cook v. Barr*, 44 N. Y. (5 Hand) 159; citing 1 Hilliard on R. P. (4th ed.) 425, 1 Greenl. Cruise on R. P. 356 n., and *Leman v. Whitley*, 4 Russ. 423; *Cook v. Barr*, 44 N. Y. 159 (5 Hand); where the N. Y. Stats. referred to are 2 R. S. 135, § 6; and the Laws of 1860, ch. 323, § 7; and it was held that the trust could not be proved partly by parol and partly by writing, though the former confirms the latter.

(u) *Bent v. Smith*, 22 N. J. Eq. 560. See for valid declarations of trust the following cases: *Bragg v. Paulk*, 42 Me. 510; *Scituate v. Hanover*, 16 Pick. 222; *Montague v. Hayes*, 10 Gray, 609; *Childs v. Jordan*, 106 Mass. 322; *Uran v. Coates*, 109 Mass. 581; *Baylis*

v. Raysen, 5 Allen, 473; Raybold v. Raybold, 20 Pa. St. 308; Williard v. Williard, 56 Pa. St. 124; Menude v. Delaire, 2 Desaus. 564; Massey v. Massey, 20 Tex. 134, citing Mead v. Randolph, 8 Tex. 191; Crook v. Brooking, 2 Vern. 50; Kingsman v. Kingsman, 2 Vern. 559; Crop v. Norton, 9 Mod. 234; Wheatley v. Parr, 1 Keen, 551; Bentley v. Mackay, 15 Beav. 12; Dale v. Hamilton, 2 Phill. Ch. 274; Childers v. Childers, 1 DeGex & J. 482; Bankhead's Trust, 2 Kay & Johns. 560. See Bayliss v. Payson, 5 Allen, 473, for an example of a covenant held to raise a trust, and for a declaration of trust held to be sufficient; Corse v. Leggett, 25 Barb. 389, for a memorandum held to amount not to a mere promise invalid without consideration but to a declaration of trust; Bond v. Bunting, 78 Pa. St. 210, for a learned opinion of Hare, J., affirmed on appeal, as to the sufficiency of a declaration of trust to constitute a gift. For examples of declarations of trust held to be invalid, see the following cases: In Bayley v. Boulcott, 4 Russ. 347, it was held that though an express trust may be decreed in personal property by parol, yet where one declared such a trust and ordered her solicitor to

have a writing embodying the trust prepared, which being done, she said that she had changed her mind, and refused to sign, it was held that the parol declaration did not under these circumstances bind her. See Randall v. Morgan, 12 Ves. 78, for a declaration held not to be sufficient to raise a gift. Also Cotten v. Missing, 1 Madd. Rep. 176, distinguishing *Ex parte Dubost* (*Ex parte Pye*), 18 Ves. 140. For an example of a valid declaration of trust see Smith v. Howell, 3 Stockt. 349; and for invalid, Grooms v. Rust, 27 Tex. 234; Duff v. Masterson, 44 N. Y. 557. As to the effect of a valid declaration of trust, see *Ex parte Dubost* (*Ex parte Pye*), 18 Ves. 140, where it was held that though a volunteer beneficiary under an executory contract cannot be helped in equity, yet where the donor declares himself trustee of the property given for the *cestui que trust*, it is enough and Chancery will act. See also Cotten v. Missing, 1 Madd. 184, as not sufficiently specifying who was to pay the money, or when, or out of what estate it was to come; and Follett v. Badeau, 26 Hun, 257, where a subscription paper to build a church was held insufficient.

CHAPTER XXXVII.

EXPRESS TRUSTS CONTINUED—EXCEPTIONS TO THE RULE RE-
QUIRING WRITTEN PROOF.

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| <p>§ 850. Express trust provable as against absolute deed.</p> <p>§ 851. Parol trust as against absolute deed.</p> <p>§ 852. In the absence of a Statute of Frauds.</p> <p>§ 853. But parol evidence sometimes held to be inadmissible.</p> <p>§ 854. Conclusive parol evidence is required.</p> <p>§ 855. Exceptions to the rule requiring written proof of trust.</p> <p>§ 856. Absence of Statute of Frauds.</p> <p>§ 857. Personality.</p> <p>§ 858. Sufficient evidence of trust.</p> <p>§ 859. Fraud.</p> <p>§ 860. Devise fraudulently procured.</p> <p>§ 861. Or where a bequest is modified or decreased.</p> <p>§ 862. But fraud in devisee or legatee must appear.</p> <p>§ 863. Purchase upon joint account.</p> <p>§ 864. Exceptions.</p> <p>§ 865. Rule applied as to personality.</p> <p>§ 866. Remedies upon the contract.</p> <p>§ 867. Payment required on the part of claimant.</p> <p>§ 868. Fraud in cases of agency.</p> <p>§ 869. Examples.</p> <p>§ 870. Where purchasing money belonged to agent.</p> <p>§ 871. The distinction illustrated.</p> | <p>§ 872. Fraud in promises to reconvey or allow redemption.</p> <p>§ 873. To convey to promisee.</p> <p>§ 874. To reconvey to promisee.</p> <p>§ 875. But generally not provable by parol.</p> <p>§ 876. And money paid cannot be recovered.</p> <p>§ 877. There must be actual fraud shown.</p> <p>§ 878. Mere breach of agreement is not fraud.</p> <p>§ 879. Fraud in conveyance to pay debts.</p> <p>§ 880. Absolute deed shown to be a mortgage.</p> <p>§ 881. Where land was paid for with borrowed money.</p> <p>§ 882. And promises to repay.</p> <p>§ 883. The rule is founded upon fraud or mistake.</p> <p>§ 884. As where bidding was discouraged.</p> <p>§ 885. But the claimant's interest in the land shall not have been divested.</p> <p>§ 886. Fraud generally in rebutting trust.</p> <p>§ 887. Express trusts in violation of law.</p> <p>§ 888. The Statute of Mortmain.</p> <p>§ 889. Effect of part performance.</p> <p>§ 890. Effect of full performance.</p> |
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§ 850. WE now consider the effect of an express trust when proved. If evidenced by a writing sufficient to satisfy the Statute of Frauds, in some States, express trusts may

Express
trust prova-

ble as
against ab-
solute deed. be proved even as against an absolute deed,(a) although the writing may have been of such informal character as has been already alluded to;(b) and where there is no statute prohibiting declarations of trust by parol, an express trust as between the parties and against an absolute deed may be shown.(c)

§ 851. Since the Statute of Frauds, however, express trusts cannot be proved by parol against a deed, not being so provable in the absence of a deed;(d) and evidence of the

(a) *Maccubin v. Cromwell*, 7 G. & J. 163, where upon a deed absolute on its face a trust was engrafted by the written evidence of a letter or of a memorandum. In *Mouan v. Hays*, 1 Johns. Ch. 339, it was held that it was inadmissible except by a writing signed to show a trust as against an absolute deed; *Irnham v. Child*, 1 Bro. C. C. 92, and *Hare v. Shearwood*, 1 Ves. Jr. 241, 3 Bro. 168, relied on, and *Hutchins v. Lee*, 1 Atk. 447, distinguished. See also *McElderry v. Shipley*, 2 Md. 37, citing the cases. In *Cripps v. Jee*, 4 Bro. Ch. 472, upon written evidence that a trust existed contrary to the terms of an absolute deed, parol evidence was admitted with the writing to show the trust, and prove the deed a mortgage; and see authorities English and American, cited in a note.

(b) See *Maccubin v. Cromwell*, 7 G. & J. 163; *Miller v. Stokley*, 5 Ohio St. 197.

(c) *Anding v. Davis*, 38 Miss. 594, citing *Soggins v. Heard*, 31 id. 426, and saying that "it is now well settled in equity, and as between the parties, it is competent to show an agreement in parol, not to contradict the deed but to bind the party to a trust which he undertook in accepting the deed, as it is not necessarily a contradiction of the deed. The estate vests according to its terms, but the grantee agrees to hold the estate conveyed subject to a trust created by an agreement *dehors* the deed, which operates in equity as a defeasance for the benefit of the beneficiaries of the

grantor. This is not in contravention of any rule of law, when there is nothing in our statutes prohibiting such declarations of trust in parol." The court instances the analogy of parol evidence to prove an absolute deed a mortgage.

In *Cuney v. Dupree*, 21 Tex. 217, it was held that a contract in writing can be shown by parol to be in trust, but the direct evidence of one witness swearing to admissions of the alleged trustee will not be sufficient without proof of corroborating circumstances; citing *McClenney v. Floyd*, 10 Tex. 159, and *Mead v. Randolph*, 8 Tex. 191.

(d) *Patton v. Beecher*, 62 Ala. 579; *Enos v. Hunter*, 4 Gilm. 211; *Marshman v. Conklin*, 6 C. E. Green, 546; *Greer v. Greer*, 18 Me. 16; *Green v. Drummond*, 31 Md. 81; distinguishing *Cecil Bank v. Snively*, 23 Md. 261; *Wolfe v. Corby*, 30 Md. 361; *Flint v. Sheldon*, 13 Mass. 448; *Titcomb v. Merrill*, 10 Allen, 15, where a voluntary conveyance, absolute in form, although aided by the oral agreement of the grantee to hold the premises for the benefit of the grantor, raises no trust in favor of the grantor; *Mouan v. Hays*, 1 Johns. Ch. 342; *Rathbun v. Rathbun*, 6 Barb. 98; *Sturtevant v. Sturtevant*, 20 N. Y. 39, citing *Hodges v. Tennessee Ins. Co.*, 8 N. Y. 416; *Jackson d. Seelye v. Morse*, 16 Johns. 199; *St. John v. Benedict*, 6 Johns. Ch. 111; *Porter v. Mayfield*, 21 Pa. St. 264; *McLanahan v. McLanahan*, 6 Humph. 99; *Rasdall v. Rasdall*, 9 Wis. 379; *Slocum v. Marshall*, 2 Wash. C. C. 397.

purpose of a deed is inadmissible to establish an express trust;(e) and uses being within the Statute of Frauds, cannot be taken to a stranger by parol averment.(f)

§ 852. But apart from the Statute of Frauds, express trusts may be proved by parol even against absolute deeds;(g) as in Pennsylvania prior to 1856;(h) or at common law prior to 29 Car. II. c. 3;(i) or where a parol declaration of the uses of a deed was good unless there was already a declaration by deed.(j)

But parol evidence of an express trust is not admissible against written evidence of the trust itself. Where, however, the deed to lead the uses of a fine and the fine itself are different, parol evidence of an intermediate agreement to lead the uses is admissible;(k) and the use in a fine or recovery does not result to the conusor but may pass by parol to the conusee;(l) but this last may be rebutted by parol,(m) and sometimes on the principle of fraud and mistake in the execution of the instrument.(n)

§ 853. But on the other hand, some of the cases hold that the rule admitting parol evidence to prove an absolute deed a mortgage is to be regarded as peculiar, and not to be

(e) *Gerry v. Stimson*, 60 Me. 188, citing *Flint v. Sheldon*, 13 Mass. 448.

(f) *Lord Altham v. Earl of Anglesey*, Gilb. Eq. Rep. 17; *Stapilton v. Stapilton*, 1 Atk. 7. But *quære* *Bushell v. Burland*, 11 Mod. 197. See 2 Rolle's Abr. 788; *Collard v. Collard*, Poph. 49; *Moore*, 687.

(g) *Harrison v. McMennomy*, 2 Edw. Ch. 251; *Cripps v. Jee*, 4 Bro. Ch. 472, citing *Irnham v. Child*, with authorities English and American cited in a note.

(h) *Kirkpatrick v. M'Donald*, 11 Pa. St. 387, citing *Ex parte Pye*, 18 Ves. 140; *Sloane v. Cadogan*; App. to Vend. and Purchasers, 24; *Antrobus v. Smith*, 12 Ves. 39. But not as between vendor and vendee; *Porter v. Mayfield*, 21 Pa. St. 264 (1853).

(i) *Fleming v. Donahoe*, 5 Hamm. (Ohio) 256.

(j) *Stapilton v. Stapilton*, 1 Atk. 7. In *Bushell v. Burland*, 11 Mod. 197,

query by Holt, C. J., whether uses even since the Statute of Frauds may not be declared by parol though trusts cannot. See Rolle's Abr. 788; *Collard v. Collard*, Poph. 49; *Moore*, 687; *Finch's Case*, 4 Inst. 86; *Shortridge v. Lamplough*, 7 Mod. 76; *Wheeler v. Newton*, Prec. in Chanc. (Finch) 16. See generally as to averring uses by parol, Anon., 1 Keble, 281; *Treganne v. Fletcher*, 2 Salk. 676.

(k) *Jones v. Morley*, Holt, 321; 2 Salk. 677; S. C. 1 Ld. Raym. 287, affirmed on appeal, Show. Pr. 140.

(l) *Ld. Altham v. Earl of Anglesey*, Gilb. Eq. Rep. 17.

(m) *Roe v. Popham*, 1 Doug. 24.

(n) *Hutchinson v. Tindall*, 2 Green. Ch. 358. And an express trust, though raised against an absolute deed, reciting no trust, is good, if admitted by the alleged trustee in an answer in equity; *Barron v. Barron*, 24 Vt. 375.

sometimes held to be inadmissible.

extended to trusts;(o) and it is well settled that an express trust by parol, apart from the Statute of Frauds, cannot be set up against a written declaration of the trust,(p) except on the ground of fraud,(q) or where the deed to lead the uses of a fine and the fine itself differ. And it may be added that a parol promise to make a declaration of trust by a grantee cannot be proved against an absolute deed where no fraud is alleged in the bill; nor can a parol promise to pay a share of the proceeds of the land (upon which promise the conveyance was made) be sued on in equity, though perhaps it might at law after actual execution, as by conveyance and subsequent sale of the land.(r)

Conclusive parol evidence is required.

§ 854. But in all cases in which an express trust is set up in contradiction to a deed, the writing must be especially clear and conclusive as to the trust, and show not only that it existed at the time of the conveyance, but also its terms and conditions.(s)

Exceptions to the rule requiring written proof of trust.

§ 855. Having considered the rule under the Statute of Frauds, which requires the existence of written proof of express trusts, and the sufficiency of the memorandum, we now turn to the exceptions to the rule, and consider the cases in which express trusts may be proved by parol, notwithstanding the statute, some of which have been heretofore referred to. They arise under the following circumstances:—

A. Absence of a Statute of Frauds.

B. Personality.

(o) *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Richardson v. Woodbury*, 43 Me. 206. But see *McClenny v. Floyd*, 10 Tex. 163, where parol evidence was held to be admissible to prove a trust or defeasance as against an absolute deed; citing *Mead v. Randolph*, 5 Tex. 191.

(p) In *Peer v. Peer*, 3 Stockt. 432, it is said: "The complainant does not present the case of a trust resulting from her payment of the purchase-money. It is not by parol testimony that she shows her title to the land. She exhibits a writing under seal, and claims its execution. Such a trust cannot be destroyed by parol, nor will the law raise up any presumption to destroy it. A resulting

trust which is established by parol evidence, may be destroyed by evidence of a like nature. An express trust, created by writing, cannot be destroyed or defeated by parol; *Nix. Dig.* 307, § 13."

(q) *Servis v. Nelson*, 1 McCarter, 94. See *Hanley v. Sprague*, 20 Me. 431; *Moses v. Murgatroyd*, 1 Johns. Ch. 128; *Davis v. Walsh*, 2 Har. & Johns. 343; *Langhorne v. Payne*, 14 B. M. 624; *Hills v. Eliot*, 12 Mass. 26 (a case of a deed in fraud of creditors).

(r) *Marshallman v. Conkling*, 6 C. E. Gr. 546.

(s) *Harrison v. McMenomy*, 2 Edw. Ch. 251; *Miller v. Stokely*, 5 Ohio St. 197.

C. Payment.

D. Fraud in certain special cases.

E. Violation of law.

F. Part performance.

G. Full performance.

§ 856. (A.) Where there is no Statute of Frauds, express trusts are provable by parol. In the United States the several legislatures have as a rule enacted provisions, similar to the English Statutes of Frauds and Perjuries, relating to the proof of trusts by writing. The States in which no provision of the kind is in force have already been referred to,^(t) and some allusion has also been made to the rule at common law in the absence of such statutes. It has been sometimes doubted whether their existence were not on the whole an evil; but the courts are especially watchful that the rule requiring written proof of trusts shall not be a cover to fraud.

§ 857. (B.) An express trust in personalty is provable by parol, as the Statute of Frauds only affects trusts in real estate.^(u) As for instance in the case of a parol declaration as to the proceeds of the sale of land as to which, under the Statute of Frauds, no parol declaration of trust would have been valid, while it was

(t) See *supra*, § 833 *et seq.*

(u) *Crabb v. Thomas*, 25 Ala. 215; *Lockhart v. Cameron*, 29 Ala. 363; *Waters v. Cowley*, 3 Harr. (Del.) 117; *Gordon v. Green*, 10 Ga. 543; *Kirkpatrick v. Davidson*, 2 Kelley, 295; *Gilmore v. Johnston*, 14 Ga. 685; *Robson v. Harwell*, 6 Ga. 589; *Collins v. Gibson*, 29 Ia. 61; *Letcher v. Letcher*, 4 J. J. Marsh. 592; *Cobb v. Knight*, 74 Me. 253; *Hunnewell v. Lane*, 11 Metc. 163; *Chace v. Chapin*, 130 Mass. 128; *Barker v. Prentiss*, 6 Mass. 430, a trust in a promissory note; *Davis v. Coburn*, 128 Mass. 377; *Bostwick v. Mahaffy*, 48 Mich. 342; *Calder v. Moran*, 49 Mich. 14; *Crissman v. Crissman*, 23 Mich. 218; *Coppage v. Barnett*, 34 Miss. 621; *Kramer v. McCaughey*, 11 Mo. App. 426; *Kimball v. Morton*, 1 Halst. 31; *Hooper v. Holmes*, 3 Stockt. 124; *Danser v. Warwick*, 33 N. J. Eq. 133;

Bucklin v. Bucklin, 1 Keyes (38 N. Y.), 141; *Day v. Roth*, 18 N. Y. 453; *Foy v. Foy*, 2 Hayw. 131; *Riggs v. Swann*, 6 Jones, Eq. 119; *Fleming v. Donahoe*, 5 Hamm. 256; *Taylor v. Mayrant*, 4 Desaus. 505; *Rutledge v. Smith*, 1 McCord, 119; *Gadsen v. Whaley*, 14 So. Car. 213; *Peyton v. Enecks*, cited in *Higgenbotham v. Peyton*, 3 Rich. Eq. 400; *Lloyd v. Executors of Inglis*, 1 Desaus. 338; *Harris v. Union Bk.*, 1 Coldw. 152; *Saunders v. Harris*, 1 Head. 185 (a trust relating to slaves); *Williams v. Conrad*, 11 Humph. 412. In *Porter v. The Bank of Rutland*, 19 Vt. 419, it was held that an express trust in personalty might be created by parol, or partly by parol, or partly by writing, or solely by writing. *Allen v. Withrow*, 3 Sup. Ct. Rept. 517; *Harkins v. Gardiner*, 2 Sm. & G. 451; *McFadden v. Jenkyns*, 1 Hare, 461; *Thynn v. Thynn*, 1 Vern. 297; *Nab. v. Nab*, 10

land,(v) or to show that an absolute bequest was made under an agreement, between the testator and the legatee, that it should be divided among certain third persons.(w) Some of the cases, however, hold that trusts in personalty cannot be proved by parol;(x) but a mortgage of personalty may be so proved.(y)

§ 858. Moreover, the proof of express trusts of personalty may be partly by writing and partly by parol, or wholly by either; but, in any case, the evidence must be clear and explicit, especially after the lapse of time, and statements of mere intentions are received with caution.(z)

Mod. 404; *Peckham v. Taylor*, 31 Beav. 254; *Parker v. Stones*, 38 L. J. Ch. 46.

(v) *Maffit v. Rynd*, 69 Pa. St. 387.

(w) *McLellan v. McLean*, 2 Head. 688; see *Calder v. Moran*, 49 Mich. 14. In *Kirkpatrick v. Davidson*, 2 Ga. 299, it is said, "Before the Statute of Frauds unwritten contracts respecting land were enforced both in law and equity, and after the passage of the law, contracts made before were subsequently enforced; 2 Shower, 17, 2 Hayw. 131, 4 Johns. R. 434, 496. The seventh section, then, of the Statute of Frauds, applying only to 'lands, tenements, and hereditaments,' it is clear that the law as it affects chattels personal remains unaltered and a valid trust of such property may not only still be created, but if necessary, established and proved by mere parol declaration; Hill on Trustees, 57." Lumpkin, J., cites Mr. Perkins (in note to Brown's Ch. Rep.) as saying that there is no specific authority for the doctrine, well established as it is, that a parol express trust may be made in personalty, and as saying that *Nab v. Nab* is only a *dictum*, and proceeds to cite the following cases as authority for the point: *Benbow v. Townsend*, 1 M. & K. 506; *Bayley v. Boulcott*, 4 Russ. 347; *McFadden v. Jenkins*, 1 Hare, 461.

(z) *Taylor v. Mayrant*, 4 Desaus. 505; *Fuselier v. Fuselier*, 5 La. Ann. 132; see *Kirkpatrick v. Davidson*, 2 Ga. 299.

(y) *Childs v. Jordan*, 106 Mass. 322.

(z) *Dipple v. Corles*, 11 Hare, 184; *Barkley v. Lane*, 6 Bush, 589; *Crissman v. Crissman*, 23 Mich. 218; *Maguire v. Dodd*, 9 Ir. Ch. 456, where a deposit of a note subject to the control of its owner upon a vague trust was held insufficient. In *Ray v. Simmons*, 1 Law & Eq. Rep. 66, the stepfather of the complainant deposited money in his own name as trustee for the complainant, and received a pass-book; "Fall River Savings Bank, in account with Levi Bisworth, trustee for Marianne Ray." It was in evidence that he treated the complainant as a daughter, and that the first thing she knew of it was that he brought the book to her and threw it into her lap. It appeared also that Levi B. took it three times to the bank to have the interest accredited, and each time returned it to her, and she made a claim for it after his death. But the respondent, the administrator of Levi B., alleged that the decedent always treated it as his own money, and deposited it as trustee, because the bank would allow him to have no larger an account in his own name. It was held that the trust was completely constituted, and was effectual; and that a voluntary trust while inchoate will not be enforced in equity, but it was otherwise when constituted, and that to constitute a trust it is sufficient for one to declare unequivocally either orally or in writing, that personalty is held *in present* in

§ 859. (*D*.) Fraud(*a*) in certain special cases will also take a case out of the effect of the Statute of Frauds; but it must have been in the procurement of the title, and be actual, ^{Fraud.} and not merely a dishonorable refusal to fulfill an express contract of trust.^(b) Such fraud occurs in the following cases:—

(1.) Devise made on a promise to the testator to hold for a certain beneficiary.

(2.) Joint purchases in certain cases.

(3.) Agency in certain cases.

(4.) Purchase upon promise to reconvey or to allow redemption.

§ 860. (1.) In the case of a devise fraudulently procured, parol proof of an express trust is generally admissible; (*c*) a rule which is well established, both under the English Statute of Frauds and the statute of wills in Pennsylvania; (*d*) and in the case of a fraudulent devise the parol trust is provable, even though the trust is illegal; (*e*) and a bill which alleges that a devisee holds under a secret trust which he fails to perform must be answered; and if the trust be admitted, the trust will be enforced though the defendant at the same time plead the Statute of Frauds.^(f) So to a bill by the heir-at-law against a de-

Devise
fraudu-
lently pro-
cured.

trust. Moreover, the creation of a trust, if otherwise unequivocal, is not affected by the creator's retention of the instrument of trust, especially where he is himself the trustee, and after the trust has once been created it is not affected by declarations of the person who created it; and in this case the trust was declared for the complainant.

(*a*) As to (*C*.) Payment, see § 827 *infra*, and Constructive Trusts, vol. 3, § 906 *et seq.*

(*b*) See *infra*, § 828, and vol. 3, § 927 *et seq.*

(*c*) *Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Equity Cas. Abr. 43; *Gaither v. Gaither*, 3 Md. Ch. 158; *Cook v. Redman*, 2 Ired. Eq. 623; *Gaulaher v. Gaulaher*, 5 Watts, 200; *Caldwell v. Caldwell*, 7 Bush, 517. As to a deed, see *Miller v. Pearce*, 6 W. & S. 97; *Lantry v. Lantry*, 51 Ill. 458; *Barrow v. Greenough*, 3 Ves. Jr. 151, and

note for cases; *Devenish v. Baines*, Prec. Ch. 3; *Crook v. Brooking*, 2 Vern. 50; *Kennedy v. Kennedy*, 2 Ala. 589.

(*d*) *Hoge v. Hoge*, 1 Watts, 214, citing cases.

(*e*) *Schultz' App.*, 2 W. N. C. 309; *Russell v. Jackson*, 10 Hare, 204; where a devise or bequest, accepted by an assent on the devisee's part, given to the testator, that he will hold the property subject to certain trusts, was held to create a trust, even though that trust be illegal.

(*f*) *Muckleston v. Brown*, 6 Ves. Jr. 52; with a careful consideration by Lord Eldon, of *Adlington v. Cann*, 3 Atk. 150; *Cottingham v. Fletcher*, 2 Atk. 155, being distinguished from the principal case. Lord Eldon said that the statute should not be used as a cover for fraud, whether for a private wrong or an evasion of a statute, as the Mortmain Law, and that he was glad that under the

vises, alleging that the devise was made on a secret trust, charitable and within the Statute of Mortmain, and asking for discovery, account, and delivery of possession, the defendant pleaded the Statute of Frauds, and the court allowed the plea to stand for an answer. In this case Eldon, Lord Chancellor, said that "the intention of the legislature in passing the Statute of Mortmain was not to be baffled by a transaction such as that alleged in the bill. The statute will never be permitted to be a cover for fraud upon the private rights of individuals, and though within the intention it cannot be said that a trust is declared under these circumstances. It is clear that a trust would be created upon the principle on which this court acts as to fraud; in the ordinary case of an estate suffered to descend, the owner being informed by the heir that if the estate is permitted to descend he will make a provision for the mother, wife, or other person, there is no doubt the court would compel the heir to discover whether he did make such a promise; so if a father devises to his youngest son, who promises that if the estate is devised to him he will pay £10,000 to the eldest son, the court would compel the former to discover whether that passed in parol, and if he acknowledged, even praying the benefit of the statute he would be a trustee to the value of £10,000, and why upon a similar principle should not a trust be raised as to the whole value of the estate, the promise extending to the whole? It would be singular if the court would protect individuals, and would not act to prevent a fraud upon the law itself." (g) Moreover, where a bill alleged that a testator by parol directed his executors to make a certain payment after his death, and accepted their assurance that they would do so, it was held that though the bill did not allege that relying on this assurance the testator forbore to add to his will, yet a plea suggesting the want of a writing was to be overruled, and the defendants were required to answer to the alleged fraud. (h) In another case, where a testator left property to A. and

authorities a disclosure could be obtained. See the cases cited in note: *Strickland v. Aldridge*, 9 Ves. 516; *Barrow v. Greenough*, 3 Ves. Jr. 152, &c.

(g) *Strickland v. Aldridge*, 9 Ves. Jr. 516, citing *Muckleston v. Brown*, 6 Ves. Jr. 52, and see the cases cited in the notes to Sumner's ed.

(h) *Chamberlain v. Agar*, 2 V. & B. 262; counsel cited *Thynn v. Thynn*, 1 Vern. 296; *Eq. Cases Abr.* 380, pl. 6; *Reech v. Kennegal or Kinney*, 1 Ves. 123; *Amb.* 67; *Drakeford v. Wilks*, 3 Atk. 539; *Mestaer v. Gillespie*, 11 Ves. 638. In *Thynn v. Thynn*, 1 Vern. 296, it was held that a will made in

B., subject to a trust recited as being known to A. and B., and providing that the execution of the trusts should be left wholly to A. and B., so that in case they should violate their trust they should not be questioned for the same either in law or equity, it was held that a certain letter written by A. to B. sufficiently showed the trust, and the property was decreed to be distributed according to the terms of such letter.⁽ⁱ⁾ And also where a daughter bequeathed all her personal property to her mother, and added, "You may, if you please, give £100 to my niece," Lord Chancellor Parker said that the £100 was not a legacy, but was held in trust by the mother.^(j) And an arrangement by which, by the creditor's direction, a debtor was to hold the debt for a third person, must have been so far consummated as to have created the trust in the creditor's lifetime, if it is to avail against the creditor's representatives.^(k)

§ 861. It is also settled that a promise by a residuary legatee to increase a certain legacy, so that the testator refrained from making a bequest, raised a trust.^(l) And where the parol proof was that the testator was induced not to make a certain legacy, but left his property to the alleged trustee, reciting his confidence that the latter would carry out his views, the trust was held sufficiently proved.^(m)

Or where a bequest is modified or decreased.

favor of A., who promises to hold for B., raised a trust in A. for B. In *Barrow v. Greenough*, 3 Ves. Jr. 151, a legacy was decreed to be increased upon proof that the residuary legatee had agreed with the testator that it should be increased, and had so led the testator not to make a new will; see a note for cases cited. In *Devenish v. Baines*, Prec. Chan. 3, it was held that where one persuades a testator to devise to him, promising to hold for another, a trust will be decreed, notwithstanding the Statute of Frauds.

(i) *Crook v. Brooking*, 2 Vern. 50.

(j) *Nab v. Nab*, 10 Mod. 404.

(k) *McFadden v. Jenkyns*, 1 Hare, 461, affirmed by the Vice-Chancellor (Wigram), who regarded it as a case of trust, and not as an agreement to assign; 1 Phill. Chanc. Rep. 157.

(l) *Barrow v. Greenough*, 3 Ves. Jr. 151, where the trust was proved by a writing of the defendant; see also *Devenish v. Baines*, Prec. Ch. 3.

(m) *Podmore v. Gunning*, 7 Simons, 644; *Oldham v. Litchford*, 2 Freem. 284; 2 Vern. 506. In *Podmore v. Gunning*, *supra*, it was said that if the plaintiffs had made out the facts alleged the law would have created a trust notwithstanding the Statute of Frauds. These were that A. had apprised his wife that he intended leaving his property to the plaintiffs after her death, and then she proposed that if he would leave it to her she would carry out his wishes as regards the plaintiffs; that A. then left his property to her, saying that he had a perfect confidence that she will "act up to those views which I have communicated to her in the ultimate

The rule is also applied in a case where a promise by an heir to his ancestor that if he the latter would not alter his will, he the former would pay certain legacies which the latter intended to make, and the promise will be enforced in equity, though by parol.(n) Or where the devisee received a devise of land upon the condition that he would pay certain annuities owing from the devisor, the Statute of Frauds does not apply, and he will be compelled to pay the annuities.(o) The reason of the rule is in fraud, and not because parol evidence is competent to vary a will.(p)

§ 862. It will be remembered, however, that the rule is not applied, and these express trusts are not provable by parol when the devisee has done nothing to procure the devise.(q) And a mere promise on which the donor might have relied will not allow the admission of parol proof in the absence of actual fraud,(r) or unless the donor was actually

But fraud in devisee or legatee must appear.

disposal of my property after her decease;" that A.'s wife died failing to provide for the plaintiffs, and that the property in question had come into the hands of the defendants.

(n) *Chamberlaine v. Chamberlaine*, 2 Freem. 34 (Parch. 1678); 2 Eq. Ca. Abr. (Parch. 1678).

(o) *Felch v. Taylor*, 13 Pick. 136.

(p) *Vreeland v. Williams*, 32 N. J. Eq. 734. In *Lane v. Dighton*, Amb. 409, it appears, by Lord Hardwicke, that trust money expended in land can be followed notwithstanding *Kirk v. Webb*, Prec. Ch. 87, and *Halcott v. Markent*, Prec. Ch. 168; see *Ryall v. Ryall*, 1 Atk. 59, if the fact is admitted by the trustee or actually proved; as to the principle the *M. R.*, Sir Thomas Clarke below, doubted but followed the authority. See cases cited in notes.

In *Childers v. Childers*, 1 DeGex & J. 482, where a father, wishing to qualify his son under the Bedford Level Act for the office of bailiff, wrote to the registrar of the level to pick out of his, the father's, property sufficient land to be conveyed to the son for this purpose, and the son died without knowing of

the transaction, it was held that, as a legal estate was sufficient under the act, the intention to convey such an estate to the son was not illegal; that the letter showed that no beneficial interest in the son was intended, and that the Statute of Frauds was no defence against the father by the heirs of the son (*semble per Turner, L. J.*, that the Statute of Frauds would have been no defence even without the letter), reversing the same case, 3 K. & J. 310.

(q) *Dipple v. Corles*, 11 Hare, 184, where one of several children of a testator, who was sole devisee, expressed at the time of the testator's funeral his intention to share his legacy and devise with his brothers, and afterwards partly performed this promise; it was held he was not further bound without a writing.

(r) *Sellack v. Harris*, 5 Viner, Abr. 521; where a man buys land in his own name, and on his death-bed tells his eldest son that they had been bought with the second son's money, and the eldest son said that the second son should enjoy them, it was held by Lord Chancellor Cowper that on the ground of fraud the case was taken out of the

misled; and *a fortiori* when the devisee knew nothing of the devise.(s)

But though a bill alleged that a testator by parol gave certain directions of trust to his executor, and did not allege reliance by him on his executor's assurance, the defendant was ordered to answer, and a plea of the Statute of Frauds overruled;(t) and so where a devise recited that a trust not described was known to the devisees, but that they were not to be answerable, a letter from the latter reciting the trust was held to bind them.(u)

Statute of Frauds; Lord Keeper Wright and the Master of the Rolls dissenting.

(s) *Tee v. Ferris*, 2 K. & J. 357; *Wallgrave v. Tebbis*, 2 K. & J. 313; *Russell v. Jackson*, 10 Hare, 204; *Schultz' App.*, 2 W. N. C. 309; *Strickland v. Aldridge*, 9 Ves. Jr. 519; *Vreeland v. Williams*, 32 N. J. Eq. 734. In *Schultz' App.*, *supra*, it is said that if an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly or impliedly, by knowledge and silence before the death of the testator, a court of equity will fasten a trust upon him on the ground of fraud, and the Statute of Mortmain will avoid it if in favor of a charity. But if the devisee have no part in the devise and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though after it should come to his knowledge he should express an intention to conform to the wishes of testator.

(t) *Chamberlain v. Agar*, 2 V. & B. 262, citing *Thynn v. Thynn*, 1 Vern. 296; *Eq. Cas. Abr.*

(u) *Crook v. Brooking*, 2 Vern. 50. But in *Lowry v. McGee*, 3 Head, 274, where a brother who having received a large estate under his father's will promised his father to buy an estate for his sister, and did so, but took title in his own name, executing no written declaration of trust, he was held not to be

bound, because there was no consideration for his promise, and it was an unexecuted trust binding only in conscience. In *Boson v. Statham*, 1 Eden, 511, see the note on page 515, with cases cited, saying that the law as established is that "If the will contains a sufficient denotation of the intention that the devisees should be trustees (a circumstance which failed in *Adlington v. Cann*, 3 Atk. 150), and the heir claiming upon the ground that the trust is ineffectually disposed of, alleges by his bill a trust against the policy of the law, the bill must be answered, and if it appears by the admissions of the answer that there was a secret trust for a charity, there will be a resulting trust for the heir." In *Boson v. Statham* Lord Keeper Henley said: "I will speak openly and declare my opinion generally, that a writing signed by the party who has power to make the trust declaring a trust upon a will is good though such writing be not attested by three witnesses, according to the solemnities of the Statute of Frauds." In *Tierney v. Wood*, 19 Beav. 334, it was held, where in the case of a clear resulting trust the *cestui que trust*, by a writing of a testamentary nature, signed but not attested, declares what shall be done with the property by the trustee, that this is a good declaration of trust within the Statute of Frauds, and no writing need be executed by the trustee, the *cestui que trust* being, in the particular

§ 863. (2.) Purchases upon joint account. It is the rule that where under a joint account one takes by the agreement title in his own name, and refuses to give the others the benefit of the contract, parol evidence of the express trust is admissible on the ground of fraud or performance,^(v) and parol evidence will be admitted where the equitable claimant surren-

Purchase upon joint account.

case, "the party who is by law enabled to declare such trust" under seventh section of Statute of Frauds. In *Wilson v. Dent*, 3 Sim. 388, A., owning certain customary freeholds which were not devisable, surrendered them to B. in trust, as B. did not deny, and afterwards made his will in words sufficient to cover these estates, and B. was admitted to the estates after his death; it was held that the will was sufficient to cause the surrenderee to hold for A.'s devisees, though B. had never executed any declaration of trust.

In *Russell v. Jackson*, 10 Hare, 204, it was held that a devise or bequest accepted by an assent on the devisee's part given to the testator that he would hold the property subject to certain trusts creates a trust, even though that trust be illegal, and the ultimate consequences be that, as to the property devised or bequeathed, the testator should be held to die intestate. See *Tee v. Ferris*, 2 K. & J. 357, for a consideration of *Walgrave v. Tebbs*, 2 K. & J. 313, and *Russell v. Jackson*, *supra*, for the extent of the doctrine that, a devisee assenting to a trust suggested by the testator, takes the devise subject to it; but that where the devisee did not know, this result would not follow.

In *Riordan v. Banon*, Ir. Rep. 10 Eq. 469, a will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone would be cognizant, and as contained in a memorandum which the testator would leave with him. It was proved by parol evidence that, before the execution of the

will, the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had assented to accept the legacy for this purpose, and had promised the testator to carry out his wishes respecting it. The residuary legatees of the testator having claimed the benefit of the legacy, it was held a valid trust, for the person named by the testator had attached to the bequest; and that parol evidence is admissible to prove that a legacy has been bequeathed upon a secret trust wholly or partially undisclosed upon the face of the will, when at or before the execution of the will the trust has been communicated by the testator to the legatee and has been accepted by the latter.

In *Kingsman v. Kingsman*, 2 Vern. 559, the plaintiff's father disinherited him, and devised both real and personal estate to the defendant; upon a bill in equity for discovery of the deeds and writings and the circumstances of obtaining the will, and whether it was upon secret trust for the plaintiff, proof was shown and in part confessed by answer of an agreement that if the plaintiff should behave well, the defendant would give him £40 per quarter; and a decree was accordingly given for that amount during the plaintiff's life. See, however, a note in which doubt is expressed that this paragraph as to the proof of £40 belongs to the case.

(v) See *Shoemaker v. Smith*, 11 Humph. 81; *Freeman v. Kelley*, 1 Hoffman, Ch. 92; *Leakey v. Gunter*, 25 Tex. 403; *Brooks v. Ellis*, 3 G. Green (La.), 528;

dered a claim on public land in order that the alleged trustee might take the legal title and share the land,^(w) or where under the contract one of the parties furnished the certificate to the land and the other labor and expenses in locating and patenting it.^(x)

And so, also, where a vendee at an auction, after the property had been struck down to him, agreed to let A. share the bargain with him and take a deed in his, A.'s, name, provided A. paid the purchase-money, and that A. should reconvey to the vendee half the land upon being repaid half the purchase-money, it was held that in an action of specific performance by B. the Statute of Frauds was no defence.^(y) Or if, under like circumstances, the equitable claimant tenders his share of the price, which is declined as unnecessary by the alleged trustee, there being also part performance.^(z)

§ 864. But the trust will not arise where two holders of a title bond agreed that the alleged trustee should have half the land, pay the whole price, and take the other half ^{Exceptions.} for security, there being no proof of mistake in taking the title.^(a)

Kelly v. Johnson, 34 Mo. 403; McIntyre v. Skinner, 4 G. Green 91; Langhorne v. Payne, 14 B. Mon. 635; Smith v. Smith, 85 Ill. 189; Butler v. Rutledge, 2 Coldw. 4; Smith v. Smith, 4 Law & Eq. Rep. 104; Powell v. Monson, 3 Mason C. C. 362 (n.); Smith v. Smith, 9 Chic. Leg. News, 352; Rhea v. Tucker, 56 Ala. 453; Ross v. Hegeman, 2 Edw. Ch. 373; Cipperly v. Cipperly, 4 Thom. & Cook, 342; Ferguson v. Williamson, 20 Ark. 272, which was a purchase by one in his own name under an agreement to buy for himself and others jointly. In McDonald v. McDonald, 24 Ind. 68 (5 Am. Law Reg. N. S. p. 675), it was held that where the title of land bought by A. and B. is taken in the name of A. a resulting trust arises; in Bragg v. Paulk, 42 Me. 510, it was held that where on a joint purchase one takes title and the other pays or secures his share of the purchase-money or gives his notes for it, a trust results to him; see also 2 Story, Eq. § 1206; Page v. Page, 8 N. H. 187; Morrell v. Cawood, 8 Baxt. 177, in which one person paid the

whole price and there was an absolute deed reciting consideration. The agreement was that each was to pay half, and it was held that there was no resulting trust for the one who paid the purchase-money, but that they were joint tenants, and the one who paid had a lien for the amount over his share of the price.

^(w) In Brooks v. Ellis, 3 G. Green (Iowa), 527, Ellis, the plaintiff, had a claim upon public land and relinquished it to Browne, the defendant, upon condition that Browne should advance the purchase-money, enter the land and convey half to Brooks on his refunding his portion of the entrance-money; it was held that a resulting trust without the Statute of Frauds was created in favor of Brooks.

^(x) Smock v. Sandy, 28 Tex. 132, citing Watkins v. Gilkerson, 10 Tex. 340; Miller v. Roberts, 18 id. 16.

^(y) Keatts v. Rector, 1 Ark. 391.

^(z) McCoy v. Hughes, 1 G. Green (Iowa), 370.

^(a) Hunt v. Roberts, 50 Me. 187.

Nor where a son conveyed to his father in order that money might more readily be raised on the land ; and there is no trust in favor of the son, but only a lien for the money.(b) But if the joint purchasers expressly agreed that whatever part over his share was advanced by one of the parties should remain a lien upon the land, the trust will be raised ;(c) and where also there has been performance, as by buying and reselling the land, an express trust in the profits is provable by parol. But the party claiming the benefit of the profit must have paid his share of the purchase-money.(d)

§ 865. The rule as to parol proof of an express trust, is recognized also in the case of a joint purchase of personalty. And in one case upon parol authority to the plaintiff's intestate, to buy jointly, stock was bought by him in his own name and for the benefit of himself and another ; and it was held that the plaintiff might recover from the defendant the latter's share of the price of the stock. A sort of resulting trust was set up, not by the *cestui que trust*, but by the trustee, and the contract had been stipulated to be reduced to writing, but the stipulation was waived ; there being evidence besides that the defendant had claimed the benefit of the purchase ; and the fact of part performance was mentioned.(e)

§ 866. And to allow recovery for the quota of purchase-money paid in a suit by the holder of the legal title has been held to avoid the rule of mutuality. As where A. held two notes of equal amount for the purchase-money of land, and transferred one of them to B. as security for a debt, and afterwards died ; under proceeding to foreclose the vendor's lien, brought in the name of his administrator upon both notes, the land was bought in by his heirs and no money paid ; it was held that a trust was created in favor of B. as to one-half the land.(f) But the trust will be raised in favor of one who arranges to pay his share of the purchase by obtaining the note of a third party.(g)

- (b) *Leman v. Whitley*, 4 Russ. Ch. 423. whether there was or not an agreement that the alleged trustee should take the legal title, see *infra*, "Constructive Trusts." § 947 *et seq.*
 (c) *Houston v. McCluney*, 8 W. Va. 143.
 (d) *Yeager's App.* 39 Leg. Int. (Pa.) 328.
 (e) *Stover v. Flack*, 41 Barb. 163.
 (f) *Phelps v. Jackson*, 31 Ark. 272.
 (g) *Morey v. Herrick*, 18 Pa. St. 128, where Herrick, the defendant, was assignee through mesne conveyances from J. P., who, under an arrangement with

For those cases where it is not shown

And the rule is the same in cases showing the difference between buying on joint account and buying exclusively for the principal.^(h) And on the other hand, if one of the joint purchasers pays the whole of the price, he can recover, and the others be compelled to repay him their share of it;⁽ⁱ⁾ or if, under an agreement in writing between the plaintiff and respondent to purchase a farm jointly, the plaintiff paid his part of the purchase-money to the respondent, but afterwards took it back upon the false representation that the defendant had rescinded the agreement; but in fact the property had been bought and conveyed to the respondent; a petition asking for specific performance and that the re-

Morey, the plaintiff's ancestor, bought land at public sale, each agreeing to pay half the price and own half the land. Morey and J. P. arranged that the price of the land should be paid at the time of the sale by J. S. B., it being the custom to give a note of a third party at the sale. J. P. and Morey, who afterwards paid more than half the price, treated the arrangement as executed; it was held that the assignee of J. P. could not disturb it, as, for J. P. under the circumstances to take the land after inducing Morey not to buy for himself under a promise to hold for him, would have been a fraud; and as at any rate a resulting trust arose from the payment of the price; citing *Wallace v. Duffield* and *Kisler v. Kisler*. The fact that Morey paid by arranging that a third person should give his note was sufficient, and Morey's subsequent payment related back, and Morey's title was binding upon those taking the legal title with notice thereof.

(h) In *Fischli v. Dumaresly*, 3 A. K. Marsh. 24, it was held that where one had bought land with his own money and taken title in his own name, there being a parol agreement between him and another that the purchase should be on their joint account, parol evidence that the purchaser was agent to buy the land was not admissible, though such

authority would have been good by parol had he bought in accordance therewith. It is said that the law as to express trusts cannot be evaded by calling the trustee an agent.

In *Green v. Drummond*, 31 Md. 79, an agreement between the plaintiff Green and the defendant Drummond was to buy jointly, the title to be taken in the defendant's name, who was to make the bargain, and Green not to be known to the vendors in the matter; was held to be an express trust, and invalid by parol. But there being further evidence that Green furnished part of the purchase-money, a resulting trust provable by parol would have arisen if the title had passed to Drummond, but the contract between him and the vendors being only executory, the resulting trust could not be proved; citing and discussing the cases.

(i) In *Kidder v. Kidder*, 53 N. H. 561, Joseph Kidder the plaintiff and Uriah the defendant bought land and took title in both their names. Joseph paid all the price, and agreed afterwards by parol that he would take the land off Uriah's hands, the latter being willing to give a deed; in an action by Joseph for Uriah's share of the money the parol agreement was permitted to be shown.

spondent be held to be a trustee of the plaintiff's share will be granted.(j)

So where A. and B. agreed to buy land, B. to buy in his own name and pay the purchase-money, and the deed to be taken in both their names, it was held that to an action for specific performance brought by A. against B., the Statute of Frauds was a good defence, there being no partnership, and the mere refusal to perform the contract was not a sufficient equity to take the case out of the Statute.(k)

§ 867. As in all other cases in which a trust results upon the ground of payment, it is essential that a part of the price shall have been actually paid by the party claiming the benefit of a joint purchase ; and the giving of a promissory note blank as to date, payee, and rate of interest is insufficient.(l) Nor is the trust raised unless the facts show the transaction to have been a purchase ;(m) and in Texas, where survivorship is abolished, a case which at common law would create a joint tenancy will raise a trust for the person who pays a part of the price.(n)

(j) *Clifford v. Kelly*, 7 Ir. Ch. 333.
(k) *Levy v. Brush*, 45 N. Y. 589.
In *Hunt v. Roberts*, 40 Me. 187, A. and B., holders of a title-bond to land, agreed with C. that he should pay half the purchase-money and own half the land ; and further, should hold the legal title to the other half as security for his loan to A. and B. of a sum large enough to pay for their shares ; the owner of the land received from C. one-half the purchase-money and B.'s note for the balance ; C. bought out B.'s quarter interest and took a deed from the original owner for the whole land ; C. then refused to secure to A. his, A.'s, quarter interest in the property. It was held that A. could not recover against C., there being no written evidence of the trust, the plaintiff having paid nothing for the land, and the defendant not having obtained the title by fraud but by consent ; see *Bryant v. Hendricks*, 5 Ia. 256.

(l) *Roberts v. Ware*, 40 Cal. 637.

(m) In *Brooks v. Fowle*, 14 N. H. 259, Fowle, the defendant, was executor of Childs, deceased, and Brooks and Childs were sureties for E., who, being unable to pay a deficiency upon his accounts as executor, made an arrangement with Brooks and Childs, his sureties, that they might lose nothing ; the court held that the transaction could not be regarded as a purchase by Brooks and Childs, so as to raise a resulting trust upon that ground as to a certain tract of land.

(n) *Ross v. Armstrong*, 25 Tex. 365 ; where an arrangement by which the grantor of a head right certificate placed it in the hands of a locator, under a covenant to locate, survey, and obtain a patent, and then to divide the land between the owner and the grantee. It was held to be not a sale of land, although formal words of conveyance were used, but an agreement for the acquisition of land in which when acquired the parties should have an equal joint inter-

The rule in regard to purchases upon joint account is applied also in cases in which such privity of title has been created between the parties that the subsequent conveyances enure to the benefit of both, though their agreement to buy jointly had been by parol; and it would also seem that, apart from privity of title, the privity of

est, and analogous to the case of a joint purchase made by two persons who advance and pay the purchase-money in equal proportions, which according to the common law would create a joint tenancy, but in Texas, as survivorship is abolished, would be deemed a trust for the person who has the interest. See also *Swartz v. Swartz*, 4 Pa. St. 358, where A. and B., owners of adjoining tracts of land, under a parol agreement erected a saw-mill at their joint expense, the site of which was upon A.'s land and the water-power upon both. B. giving up the use of the water-power on his land as A. gave up the site of the mill on his, B.'s assignees sold the tract, described as a saw-mill with its appurtenances; and it was held that the purchaser might recover an undivided moiety of so much of A.'s land as was used for the mill; that if the contract between A. and B. was for a term of years only, yet if the purchaser from B. continued in possession after the determination of the term, and jointly with A. erected a new mill on the old site, to propel which the power of A.'s land was necessary, A. was estopped from denying the right of the purchaser to a moiety of the mill site. It was urged by A. that as the original agreement had expired by its own limitation, the new parol agreement between A. and B. was void by the Statute of Frauds; but that was to be not for an interest in land, but only a license to use it in a certain way without disturbing the title of the owner as a trustee, and that the principle of relief is upon fraud, and equity would not permit the owner of the soil to

recover; citing and discussing the cases. As to the rule in cases of co-tenancy see *Workman v. Guthrie*, 29 Pa. St. 506; or where the parties had previously been joint tenants and where the land was sold for taxes, the agreement was that one should buy for both and it was regarded as a trust; *Stewart v. Brown*, 2 S. & R. 461. See also *Robertson v. Robertson*, 9 Watts, 34; citing *Peebles v. Reading*, 8 S. & R. 491; *Kisler v. Kisler*, 2 Watts, 324. In *Hidden v. Jordan*, 21 Cal. 98, where Hidden the plaintiff agreed verbally with Jordan the defendant that the latter should buy certain land for him, but that the title should be taken in Jordan's name, that part of the purchase-money should be paid by each, but that upon Hidden's repaying Jordan, the latter should convey the land to Hidden. Hidden advanced Jordan a part of the purchase-money, but Jordan paid the whole amount himself. It was held that the Statute of Frauds did not apply; that parol evidence was admissible to prove a resulting trust as to the money paid by Hidden, and being admitted for that purpose, the parol evidence could show the whole transaction.

In *Cipperly v. Cipperly*, 4 Th. & Cook, 342, where F. purchased lands for himself and his brother jointly, the brother paying his part of the consideration but taking the conveyance in his own name; another time their father conveyed certain lands to J., that he might convey them to his brother and himself (J.), jointly; it was held that a trust was thereby created in favor of the brother of the undivided one-half of the land.

contract might raise a trust which would take the case out of the Statute of Frauds.(o)

(o) This subject is well discussed in *Flagg v. Mann*, 2 Sumn. 529, where the children of Frye had an estate which their guardian sold in June, 1823, to Luther Richardson, and by sundry conveyances Walker and Fisher became in June, 1826, joint owners subject to an equity of redemption in Luther Richardson, who had mortgaged the property in September, 1824, and in 1826. In the May previous, 1825, Luther Richardson had conveyed his interest to Prentiss Richardson, who claimed to hold only in trust for Luther, and on May 13th, 1831, Flagg and Mann agreed to buy the land jointly, and take the title of Richardson, and that of Walker and Fisher; Luther Richardson conveyed to both Flagg and Mann, May 13th, 1831, and took their note for the purchase-money; on July 27th, Walker and Fisher conveyed to Mann alone, and on August 6th, the title of the Frye children became by conveyance also vested in him. It was held that unless a fiduciary relation existed between them, the Statute of Frauds was a bar to Flagg enforcing his parol contract with Mann against the latter. But under the facts the court held that by the purchase from Richardson, made by them both, there was such a privity of title created that the subsequent conveyances enured to the benefit of both, though their agreement to buy jointly had been by parol, and it would seem that, apart from privity of title, the privity of contract might have raised a trust which would have taken the case out of the Statute of Frauds. It is said that *Flagg v. Mann*, 14 Pick., went off on a point of jurisdiction; and Story, J., did not agree with that decision in holding that the title to the land was entirely in Walker and Fisher, and that Richardson's deed to Flagg and Mann passed nothing.

The court also say: "The other point, however, suggested at the argument by the plaintiff's counsel, is not undeserving of notice. It is, that even if no title in the premises did pass by the deed of Luther Richardson to Flagg and Mann, yet nevertheless there was a color of title in him at the time, and that the deed itself, being accepted by Flagg and Mann, and an assignment being taken and notes given, under and in virtue of the parol agreement between them, for the joint purchase from Richardson, these facts did of themselves create a privity of claim and right in the premises, sufficient to establish a fiduciary relation between them. And if such a fiduciary relation actually did exist, then the purchase of Mann from Walker and Fisher, and from the Frye heirs must be treated in equity as a purchase for the joint account of Flagg and Mann. There is great force in this argument, and I am not prepared to say that it is not well founded." Story, J., declined to rest the case on estoppel, as he thought the privity sufficient, and, besides, the conveyance by Luther Richardson to Prentiss Richardson might be proved by parol to be in trust; for Mann could not insist upon the Statute of Frauds if Prentiss Richardson did not do so. It appears that in the view of a court of equity the execution of the deed to Walker and Fisher, and the giving of the bond by them to Luther alone, with the assent of Prentiss, amounted to a complete execution of the trust between Luther and Prentiss, and is precisely the same in effect as if Prentiss had first conveyed the premises to Luther, and the latter had then conveyed to Walker and Fisher, taking from them the bond. "Courts of equity do not regard the forms of instruments, but they only look to the in-

§ 868. (3.) Agency in certain cases. Where an agent authorized to buy in his own name refuses to carry out the express trust under which he bought, parol evidence is admissible on the ground of fraud; and whether the taker of the legal title is called an agent or trustee, is not material. The cases are not always clear as to whether the title was taken by the agent in his own name in accordance with the directions of his principal; and they are indiscriminately spoken of as express or resulting trusts; and the distinction made in regard to the ownership of the purchase-money paid, will be treated of hereafter.^(p) If one agrees by parol to buy land for another, and he does so and pays for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement in spite of the Statute of Frauds.^(q)

Fraud in cases of agency.

§ 869. But where the agent of an obligee in a title-bond procures the alleged trustee to take title from the heirs of the obligor, who will not convey directly to the obligee, a trust will be decreed;^(r) and where half of certain unpatented land was conveyed to the owner of the other half, in order that a patent might be obtained for the whole, the trust was decreed;^(s) and so if the owner of a claim procures an agent to take title, and the agent

Examples.

tent, and give to the acts of the parties the construction which that intent justifies and requires, as far as consistently with general principles it can be done. Here is the case of an executed trust, which is wholly beyond the reach of the Statute of Frauds."

(p) As to agreeing to buy for another being an express trust, see *Cecil Bank v. Snively*, 23 Md. 261; *Smith v. Burnham*, 3 Sumn. 435; *Hidden v. Jordan*, 21 Cal. 98. See *Constructive Trusts*, vol. 3, § 958 *et seq.*

(q) *Hargrave v. King*, 5 Ired. 436; *Chastain v. Smith*, 30 Ga. 96; *Switzer v. Skiles*, 3 Gilm. 529; *Corse v. Leggett*, 25 Barb. 389. In *Miazza v. Yerger*, 53 Miss. 139, the charge made against the defendant was that he undertook, promised, and agreed as her agent and attorney, to attend the sale and bid in one-half of said property for the complain-

ant, who had made arrangements to obtain from Mr. Helm the money to pay for such interest; and that Yerger, instead of doing as he promised, bought the property for himself, and had title made to himself instead of to the complainant. It was held that parol evidence was admissible to prove facts out of which the law implied a trust without an express agreement of trust, and that the only trust here was that arising out of the agreement to buy, void under the Statute of Frauds, and that therefore this was not a case of resulting trust.

(r) *Shields v. Trammell*, 19 Ark. 51.

(s) *Lingenfelter v. Ritchey*, 58 Pa. St. 485, distinguishing *Porter v. Mayfield*, 21 Pa. St. 264, which held that to show by parol a trust for a third person, was not to contradict an absolute deed; *secus* as to a trust for the vendor.

acknowledges the claimant's equitable title, the trust will be decreed.(t) Or if the mortgagee of a copyhold, physically unable to take a surrender, took the surrender of the legal title to his agent, who gave a written declaration of trust, and the mortgagee afterwards bought the equity of redemption, and procured surrender of the equitable title to the agent, the express trust will also be decreed;(u) and the rule is the same in a case in which a purchase of the legal title was made at the request of the mortgagor, threatened with foreclosure, and a trust was decreed, but it may be noticed that there was part performance in the case.(v)

§ 870. If the agent pays his own money, an express trust, in the absence of fraud and under ordinary circumstances, will not be permitted to be shown. This applies in cases in which the agent takes the title in accordance with an agreement as well as in those cases in which he does not do so.(w) In some cases, moreover, a distinction is made between buying on joint account and buying exclusively for the principal; and it is said that the law requiring express trusts to be proved by a writing, cannot be evaded by calling the trustee an agent.(x) And so an agreement on the part of one who has acquired title to land, made subsequently to his purchase, that he holds the title for another and is ready to convey upon being reimbursed, is *a fortiori* an express and not a resulting trust, when a trust at all, and not a mere contract for the conveyance of land.(y)

§ 871. It has been said as to express and implied trusts being or not within the Statute of Frauds, that the distinction is this: If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance,

(t) *McIntyre v. Skinner*, 4 G. Greene, 139; see "Constructive Trusts," § 962. 89.

(u) *Acherley v. Acherley*, 7 Br. P. C. Marsh. 24.

(y) *Perry v. McHenry*, 13 Ill. 231;

(v) See *Lincoln v. Wright*, 4 DeG. & J. 20, as to trusts arising in purchases by agents. *Harder v. Harder*, 2 Sandf. Ch. 17; *Jackson d. Kane v. Sternbergh*, 1 Johns. Cas. 155; *Garrett v. Garrett*, 27 Ala. 689.

(w) *Langhorne v. Payne*, 14 B. Monr. 635; *Miazza v. Yerger*, 53 Mississippi, 465.

but accepting it and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interposed and advised A. not to convey directly to C. but to convey to him, promising that if A. would do so he, B., would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A.^(z) And although a simple avowal of acquisition for the use of another, whether made contemporaneous with or subsequent to the fact, will not of itself support an allegation of trust; yet it is equally well settled that if one be induced to confide in the promise of another that he will hold in trust, or that he will so purchase for one or both, and is thus led to do what otherwise he would have forborne or to forbear what he contemplated to do in the acquisition of an estate whereby the promissor becomes the holder of the legal title, an attempted denial of the confidence is such a fraud as will operate to convert the purchaser into a trustee *ex maleficio*.^(a) But where one buys, pays, and promises to hold for another, it is really an agreement to convey upon being reimbursed, and generally is within the Statute of Frauds;^(b) or if the promissor is to let the promisee have certain land upon payment of the price for which the promissor had given his note, it is an express trust within the statute.^(c)

§ 872. (4.) Fraud also occurs in cases of purchases on a promise to reconvey or to allow redemption; and where the purchase is made under an agreement by which the equitable claimant is to have a conveyance of or trust in the land, the promise is:—

Fraud in promises to reconvey or allow redemption.

I. Generally to convey to the promisee.

II. To reconvey to the promisee, who had previously been the owner.

III. Or to treat the title in the legal holder as a mortgage.

§ 873. I. As a general rule a mere promise under which the legal title is obtained does not give rise to a trust of any kind; and where there is a trust it is an express trust and not

To convey to promisee.

(z) *Lantry v. Lantry*, 51 Ill. 458.

(a) *Morey v. Herrick*, 18 Pa. St. 128.

(b) *Kisler v. Kisler*, 2 Watts, 324, distinguishing and considering all the

cases. See also *Wentworth v. Wentworth*, 2 Minn. 283.

(c) *Chambliss v. Smith*, 30 Ala. 369.

provable by parol.(d) It must be shown that the promisee has suffered loss or injury by reason of his reliance upon the promise; and in instances in which there is nothing more than the inconvenience which in every case arises when good faith is not kept, equity will not give relief.(e) But especially is the trust not provable by parol where the only interest in the land on the part of the promisee is under the promise;(f) but a parol contract that the plaintiff, who has occupied and made valuable improvements with the knowledge of the promisor, since deceased, should have the land upon repayment, will be enforced as against the promisor's executor;(g) and the trust will be decreed in a case in which a demise has been procured on a promise to hold for another, on which the grantor actually relied.(h) A mere promise, however, is not enough, and where there was no procurement or fraud the trust will not be decreed.(i)

§ 874. II. A promise to reconvey to the promisee, who had previously been the owner, sometimes raises a trust;(j) as To reconvey to promisee. where possession of land is obtained to prosecute trespassers, and reconveyance is not made as was promised;(k) and the trust arising from an agreement to allow redemption upon repayment will remain in force, if afterwards at a subsequent sale the alleged trustee buys in again to protect the property and disencumber

(d) *Wilson v. McDowell*, 78 Ill. 514; *Barnard v. Jewett*, 97 Mass. 87; *Rucker v. Steelman*, 73 Ind. 400. But see *Cohn v. Chapman*, Phillips, Eq. N. C. 92; *Van Syckel v. Kline*, 4 N. J. L. J. 345.

(e) See *Constructive Trusts*, § 929 *et seq.*

(f) *Walter v. Klock*, 55 Ill. 362; *Farnham v. Clements*, 51 Me. 426; *Perry v. McHenry*, 13 Ill. 231; *Blair v. Bass*, 4 Blackf. 545; *Williams v. Brown*, 14 Ill. 200; *Holmes v. Holmes*, 44 Ill. 168. Or after great lapse of time and the death of the promisor; *Norris v. Knox*, 1 Pitts. L. J. Pa. 56.

(g) *Patterson v. Copeland*, 42 How. Pr. 463.

(h) *Hoge v. Hoge*, 1 Watts, 163; *Gaither v. Gaither*, 3 Md. Ch. 158; *Miller v. Pearce*, 6 W. & S. 97; *Lantry v. Lantry*, 51 Ill. 458; *Bedilian v. Seaton*, 3 Wall. Jr. 279.

(i) In *Bedilian v. Seaton*, *supra*, a mere promise by two heirs that they would convey the intestate's property to a third person, whereby the intestate may have been led not to make a will, is not, in the absence of fraud, to be regarded as an implied trust; and *Hoge v. Hoge* is distinguished. See § 823.

(j) *Papineau v. Gurd*, 2 U. C. Ch. 512, where there was possession and improvements; *Chilson v. Reeves*, 29 Tex. 280; *Crocker v. Young*, Rice, Ch. (S. C.) 30; *Hayden v. Denslow*, 27 Conn. 341; *Rose v. Bates*, 12 Mo. 30; *Clark v. Eby*, 13 Grant, Ch. 371; *Williams v. Williams*, 8 Bush, 254. Or if the promisee is a subsequent incumbrancer; *Osborn v. Mason*, cited in *Ryan v. Dox*, 34 N. Y. 316; *Rose v. Bates*, 12 Mo. 30.

(k) *Lee v. Lee*, 11 Rich. Eq. 582, citing the cases.

the title.^(l) The parol agreement to reconvey or allow redemption may, moreover, be used in Pennsylvania as the foundation of an action on the case, the declaration alleging that the defendant fraudulently intended to injure the plaintiff^(m) or to recover the excess from the sale of the land by the promissor to a third person, after the payment of the debt owing by the promisee to the promissor.⁽ⁿ⁾ An agreement to let the defendant in execution redeem is not a mere contract for a loan with a lien on the land, because the promissors were to and did take the title of the land.^(o) And the promise by one who purchases at sheriff's sale to hold land bought at the instance of the defendant in the execution, until from the rents the latter can repay him, is not within the Statute of Frauds, because it has only the effect of postponing the time when the defendant may redeem, he having that right all the time; and if under this parol contract the defendant lets the time of redemption go by, the extension of it by the parol contract keeps the right alive.^(p)

Sometimes the parol agreement will sustain an action on the case.

§ 875. But generally the rule is that even when the promisee had a previous interest in the land, a mere promise to allow a redemption is not provable by parol;^(q) and where the owner of the land executed a deed of trust, and the conditions of which not having been fulfilled the land was sold to G., who verbally promised to allow the owner to redeem it upon payment of a certain sum which Johnson, the defendant, afterwards agreed to lend him, and which he subsequently in fact paid to G., taking title in his own name; it is said that apart from the objection that the owner had never made any payment and the

But generally not provable by parol.

(l) *Mulholland v. York*, 82 N. Car. 511.

(m) *Thompson v. Sheplar*, 72 Pa. St. 165.

(n) *Graves v. Graves*, 45 N. H. 323, where it was said, the parol agreement having been made that the defendant should reconvey or if the land was sold should account, that the plaintiff could not compel reconveyance except the agreement was in writing because of the trust; but that if the land was sold he could maintain the action, and proof of the agreement would not be the same thing as proving that the defendant

held the land in trust; citing *Hall v. Hall*, 8 N. H. 129. See also *Gwaltney v. Wheeler*, 26 Ind. 415.

(o) *Getman v. Getman*, 1 Barb. Ch. 504.

(p) *Griffin v. Coffey*, 9 B. Mon. 453.

(q) *Lathrop v. Hoyt*, 7 Barb. 62; *Harrison v. Bailey*, 14 So. Car. 334; *Graves v. Graves*, 45 N. H. 323; *Miltnerberger v. Morrison*, 39 Mo. 71. In *Garrett v. Garrett*, 27 Ala. 689, it was conceded for the sake of the argument that a purchase of lands at an execution under a parol agreement with the defendant in the execution to purchase for his ben-

want of consideration of the promise, it was at best but a verbal one and void by the Statute of Frauds.(r)

§ 876. Moreover, in one case in New York, under its circumstances a payment of money made upon a parol contract to reconvey can not be recovered;(s) but a vendor's lien will sometimes be enforced in cases where a parol arrangement would fail.(t)

And money paid cannot be recovered.

est would enure to the benefit of the purchaser himself, under the Statute of Frauds. In *Fox v. Heffner*, 1 W. & S. 376, the court say: "It is now settled by repeated decisions of this court, that if one buys the defendant's property at sheriff's sale and verbally agrees to hold it in trust for the defendant, with a right of redemption in him within a limited period, it is a contract resting in parol merely, and not transferring an interest in the land. Such a transaction cannot be regarded as a sort of mortgage so as to take it out of the Statute of Frauds, as the sheriff must make an absolute deed to the vendee."

In *Loomis v. Loomis*, 60 Barb. 32, where the plaintiff's farm was sold under a foreclosure and was bought by Ward, who orally promised the plaintiff that upon being repaid the amount he paid for the farm he would reconvey to the plaintiff, who in the meantime remained in possession; the plaintiff, Ward, and the defendant afterwards made a parol agreement under which Ward conveyed to the defendant, who agreed to reconvey upon the same terms which Ward had formerly made, the plaintiff to continue to remain in possession and receive the rents and profits; it was held that this parol agreement was within the Statute of Frauds; that there was no express trust, because the plaintiff had no property to put in trust, and besides there was no written declaration of trust; and that there was no valuable consideration given by the plaintiff to create a resulting trust, and

there was no part performance. See also *McClure v. McCormick*, 5 Blackf. 137.

(r) *Magnusson v. Johnson*, 73 Ill. 158; *Stephenson v. Thompson*, Id. 168; *Reeve v. Strawn*, 14 id. 94; *Holmes v. Holmes*, 44 id. 168; *Botsford v. Burr*, 2 Johns. Ch. 404; *Taintor v. Keyes*, 43 Ill. 332; *Ranstead v. Otis*, 52 id. 30.

(s) *Hall v. Shultz*, 4 Johns. 243, where, the plaintiff's farm being about to be sold on execution, the defendants at his instance bought it upon an agreement to reconvey upon being refunded the money advanced; the defendants refused to reconvey and demanded three hundred dollars in addition, which the plaintiff paid, and which he now sues to recover; a nonsuit was entered on the ground of the Statute of Frauds; but query whether the defendants had reconveyed the farm to the plaintiff or not.

(t) *Rutland v. Brister*, 53 Miss. 683, where the complainant Rutland was a judgment debtor, and Buckley was a judgment creditor and bought at the sale, and said that if Rutland found a purchaser he could have the excess after paying the judgment debt. Brister, the defendant, bought from Rutland and paid the amount of Buckley's judgment, and gave notes for the rest, and Buckley executed the deed to Brister. A suit was brought by Rutland to foreclose the vendor's lien, and it was held to be good. If it had been a parol arrangement between Rutland and Buckley to enforce a contract, it would fail under the Statute of Frauds; but in this case Rutland was Brister's vendor.

§ 877. It is to be noticed, moreover, that a promise to buy in for the defendant in an execution, will not raise a trust unless there is actual fraud ;(u) but where a judgment debtor agreed to give up his right of redemption and thereupon the judgment creditor agreed to account to him for the surplus, the agreement was held to be binding.(v)

There must be actual fraud shown.

§ 878. But, as has been heretofore said, the mere breach of a parol agreement is not such fraud as will relieve the effect of the statute; but bidding must have been discouraged or some other substantial injury to the promisee appear, in order to raise the trust.(w)

Mere breach of agreement is not fraud.

(u) In *Gwaltney v. Wheeler*, 26 Ind. 415, R. & H., creditors of Wheeler, issued execution on a mortgage and bought in the land of Wheeler, who was then in the army, and Gwaltney procured from R. & H. the certificate of sale, verbally promising to sell the land, pay himself a debt due him from Wheeler, pay R. & H. a certain agreed sum, and the balance to Wheeler's wife. Gwaltney sold the land for a high price, but did not pay Mrs. Wheeler as he promised. It was held that the plaintiff might recover, as it was not a trust within the Statute of Frauds concerning lands.

(v) *Conover v. Brush*, 2 N.Y. Leg. Obs. 294, where it is said that a contract by a judgment creditor bidding in the property sold under his execution, to hold it for the judgment debtor, does not create any trust.

(w) *Miltenberger v. Morrison*, 39 Mo. 71; *Davis v. Hopkins*, 15 Ill. 522; *Marlatt v. Warwick*, 3 C. E. Gr. 109; S. C. 4 id. 440. In *Sheriff v. Neal*, 6 Watts, 534, the commissioners of the county having obtained judgment against a delinquent collector and his surety, caused their lands to be levied on and sold by the sheriff, whereupon the commissioners became the highest bidder, though for a price much less than the amount of their judgment.

They did not have the sale perfected by getting a deed of conveyance from the sheriff, but let it lie over for eleven years, telling the debtors they might redeem. J. S. then got the land from the commissioners upon the payment of the judgment against the debtors, because he said he was going to hold it for them; and the court thereupon held that he was a trustee for the debtors, inasmuch as he got it for one-half its value. And in *Davis v. Hopkins*, 15 Ill. 522, V., the assignee of Hopkins, plaintiff, who entered and made improvements on government land, agreed with Davis the defendant that the latter should take up the land at the government sale and hold it for him, V. It appears to have been held that the prevention of bidding would take it out of the Statute of Frauds, though a breach of the parol contract to reconvey would not be such fraud as to make an exception to the Statute of Frauds; but that it was not a contract relating to land, but, under such circumstances as attended sales of the kind, it was a mere loan of money and not a contract relating to land, and that the complainant was entitled to the land which was being held for him by the defendant, upon repaying the latter his advances. It appeared that Davis did not take possession after the sale, and that V. did.

§ 879. III. Where a conveyance of land was made for the security of the grantee or of the grantor's creditors, and subject to a trust for reconveyance after the fulfillment of the trust relating to the grantor's debts, parol evidence is admissible to show these facts, which when shown will make an absolute deed stand as a mortgage.^(x)

Fraud in conveyance to pay debts.

As to how far a parol defeasance in the nature of a trust may be annexed to an absolute instrument, see the subject of Mortgages. It may in this place be remarked, however, that where real estate is conveyed by an absolute deed to a creditor, with an understanding that he shall satisfy his debt, indemnify himself, pay creditors, and hand the balance to the wife and children of the grantor, it is a mortgage as to the debt and a trust as to the balance.^(y) Or where A. conveyed land to B. as security for a debt of A.'s much less than the value of the land, which B. assumed, and B. agreed by parol to reconvey the land upon being indemnified for the debt, it was held that whatever might be the course in equity the law would not allow an *assumpsit* for the value of the land, though an action to recover the amount of the indemnity paid by A. to B. would lie if B. refused to reconvey the land in accordance with the parol promise.^(z) In one case, where the grantor, fearing a criminal prosecution, and wishing to secure for his family his property, made an absolute deed to his brother, it was held, in an action by the grantor's administrators to have a trust declared by the brother as to the property, that the Statute of Frauds was a complete defence. And it has been said that the rule that a defeasance may be shown by parol is doubtful on principle and not to be extended, and the obvious analogy suggested of mortgages is not to be acted

(x) *McCollister v. Willey*, 52 Ind. 389; *Bulkley v. Storer*, 2 Day, 531; *Ballentine v. White*, 77 Pa. St. 25; *Lingenfelter v. Ritchey*, 58 Pa. St. 488; *Maffitt v. Rynd*, 69 Pa. St. 387; *Cripps v. Jee*, 4 Bro. Ch. 472. As to deed taken for security, *Carr v. Carr*, 4 Lans. 314; 52 N. Y. 258; *Jackson v. Gray*, 9 Ga. 77. As to conveyance to pay debts, *Shields v. Whitaker*, 82 N. Car. 519; *Newell v. Newell*, 14 Kan. 202; *Cooper v. Whitney*, 3 Hill, 95. In *Williams v. Hill*, 19 How. (U. S.)

250, it was held that a trustee who holds a surplus under the terms of the deed of trust for the grantor, could not retain it as a security for debts subsequently made on parol engagements, as this would violate the Statute of Frauds; and that a deed of trust is not such a conveyance as will afford security for subsequent engagements.

(y) *McLanahan v. McLanahan*, 6 Humph. 99.

(z) *Greer v. Greer*, 18 Me. 16.

on except when the omission to insert a defeasance in the writing was caused by fraud or mistake at the time, and it has been held that as to mortgages, though a defeasance may be shown by parol, yet it is acknowledged that the rule is otherwise as to express trusts.(a)

But sometimes where the owner of the legal title has lent the real purchaser of the land the purchase-money, and taken the legal title for his security, it is still a resulting trust;(b) as where A. and B. as security for a certain sum obtain from C. the absolute title to land worth four times the amount of the money lent, and then sell the land to a *bona fide* purchaser, it was held that C. could recover upon parol evidence the purchase-money from A. and B. on the ground of fraud; A. and B. being regarded in equity as trustees.(c)

§ 880. Parol evidence is admissible to prove an absolute deed to be a mortgage; but where the debt does not remain or is considered as paid by giving the deed the proof must be very plain;(d) and if, for instance, A. agreed to lend B. a sum necessary to purchase land, and to take a deed to himself by way of mortgage to secure the repayment of the money, and if A. buys the land with the money thus lent, then a resulting trust will be created in the nature of a mortgage, and B. will have the right to redeem.(e) In another case a debtor transferred land to a trustee to secure a debt, and afterwards another person and the debtor agreed that the former should purchase the land and hold it as a security for the purchase-money, and accordingly the debtor acquiesced and the other purchased the land, and the transaction was allowed to be shown to be a trust.(f)

Absolute deed shown to be a mortgage.

(a) See *infra*, § 1029. *Rasdale v. Rasdale*, 9 Wis. 379. In *Ballentine v. White*, 77 Pa. St. 25, it was held that the Act of April 22d, 1856, § 4, is prospective, and that it did not at any rate prevent an absolute deed from being proved a mortgage by parol; see *Lingenfelter v. Ritchey*, 58 Pa. St. 488, and *Maffitt v. Rynd*, 69 Pa. St. 387, with cases cited.

(b) *Coates v. Woodward*, 13 Ill. 654. In *Cousins v. Wall*, 3 Jones, Eq. 43, where A. is under bond to convey land to B. and conveys it to C., who ad-

vances the money for B. under an agreement that he will convey to B. upon reimbursement, it was held that the Statute of Frauds was no bar to recovery by B. from C; *Cloninger v. Summit*, 2 Jones, Eq. 512, being cited.

(c) *Cameron v. Ward*, 8 Ga. 245.

(d) *Hogan v. Jaques*, 4 C. E. Green, 123. See *infra*, ch. XLII., vol. 3, p. 137.

(e) *Reeve v. Strawn*, 14 Ill. 94.

(f) *Nease v. Capehart*, 8 W. Va. 104, where it appears that the statute of West Virginia does not contain the §§ 7 and 8 of 29 Car. II., but only § 4 to some

§ 881. And upon a bill for an account and for a deed, it appeared that the plaintiff bought land, paying for it with money borrowed from the defendant upon collateral, the deeds being made out in the latter's name; and it was agreed that upon the payment of the money borrowed or upon its realization from the collateral, the title to the land should be transferred to the plaintiff. The defendant also had the title to another lot of land belonging to the plaintiff upon the same terms; and this lot having been sold, the defendant retained the proceeds; and the Statute of Frauds was held not to apply.^(g)

Where land was paid for with borrowed money.

§ 882. The rule is applied also if the complainant holds an inchoate right to land under a contract which he is unable to complete, and the respondent, refusing to lend the complainant money, says that he will become the purchaser by paying what the complainant owed on the contract, and that the complainant could repay him out of that year's crop.^(h)

And promise to repay.

extent altered; and H. being indebted conveyed to S. as trustee, who made a conveyance upon valuable consideration to J. C. At the same time it being agreed upon by H. and J. C. that the latter should hold the title for H.'s benefit until he should be repaid the purchase-money, and that H. should have possession and receive the rents and profits. After the death of J. C. this suit was brought, and the answer denied the alleged agreement and set up the Statute of Frauds. It was held that the transaction was not a mere contract for the sale of land, and that under the West Virginia statute it was immaterial that the agreement to hold as security was not in writing; but at the same time that the evidence to show such a trust must be clear and precise. In its opinion the court compares minutely the English and Virginia statutes, citing and quoting the leading cases.

^(g) In *Keller v. Kunkel*, 46 Md. 565, the court below decided that the transaction was not a resulting trust, but a verbal agreement in regard to lands and within the Statute of Frauds; but upon

appeal the ruling was reversed, the court citing and distinguishing the cases.

^(h) *Runnels v. Jackson*, 1 How. Miss. 358, where it is said that the title was given to Runnels only as security, and this fact was permitted to be shown; distinguishing *Botsford v. Burr*, 2 Johns. Ch. Rep. 405, where the answer denied the agreement alleged, and citing *Boyd v. McLean*, where the agreement was admitted in the answer as analogous to the principal case. In *Catlett v. Bacon*, 33 Miss. 281, where Catlett, a debtor, made a deed of trust conveying certain lands in trust to pay his debt, and stipulating that the bank, a creditor of the debtor, who held certain of his lands, would convey them upon payment of the debt, and Cuthbert afterwards conveyed the land to Winslow, the latter assuming the debt. Bacon, the plaintiff, received by assignment from the bank the note evidencing Catlett's debt to the bank, which had bought at sheriff's sale of Catlett's land. The deed of trust was not signed by the bank or the trustee; and it was held that the bank took nothing under the

§ 883. The rule goes upon the theory of fraud or mistake in omitting the defeasance ;(i) and will be enforced where there has been part payment made, and the title taken as security for advances made to cover the rest of the price.(j) If there is a secret defeasance upon an absolute deed given as security for notes which were afterwards endorsed to a third party who in fact advanced the money, the latter will be held to be the real mortgagee.(k)

The rule is founded upon fraud or mistake.

§ 884. The rule is applied where the grantees who bought the land cheap by representing that they were buying in for the previous owner and thereby discouraged bidding, and were held subject to recoup themselves out of the profits, and having done so to reconvey. So a parol agreement to hold land as security will be upheld, in cases in which an agreement to reconvey or allow redemption would be declared invalid ;(l)

As where bidding was discouraged.

deed of trust which would pass by the assignment which it also made to Bacon of the interest thereunder. As Catlett had no title in the land, he passed nothing to the bank by the deed of trust; he passed nothing to Winslow, so that their promise was without consideration. A bill therefore against Catlett, the bank, and Winslow, to have the land sold and the notes paid, was dismissed. *Query*, whether if the bank had conveyed to the plaintiff Bacon their interest in the land, he would not have had the land, as the title seems never to have left the bank. In *Morrison v. Ball*, 54 Ga. 214, Morrison the plaintiff wished to buy the Smith place, by exchanging for it the Atlanta farm property, for which he held a title-bond, and paying \$1500; as he could not pay that sum nor what he owed for the Atlanta property, he agreed with Ball, the defendant, to pay both and take the title to the Smith lot, sell it, deduct these amounts and an old debt due him by Morrison, and pay the latter the balance. Ball took title in his own name to the Smith place; and it was

held that there was a resulting trust provable by parol, but that the evidence must be clear.

(i) *Rasdall v. Rasdall*, 9 Wis. 385.

(j) In *Houser v. Lamont*, 55 Pa. St. 317, B. bought land at a sheriff's sale, and by agreement by parol conveyed to Miss Lamont, an heir of the execution debtor, and received from her part of the purchase-money; the latter not being able to pay the rest of the price, it was arranged that Houser should advance the money and hold the property until he was repaid, B. then making a deed to Houser; it being held that the latter deed was really a mortgage, B. was a competent witness to show the parol contract with Miss Lamont, but as he did not choose to avail himself of the Statute, Houser the mortgagee could not do so.

(k) *Chadwell v. Wheless*, 6 Lea, 322.

(l) In *Jackson v. Stevens*, 108 Mass. 94, in an issue whether land purchased in the name of the defendant was held by him as a resulting trust in favor of the plaintiff, the jury were instructed that if the conveyance was made to the

and a stipulation that a trustee should not have to reconvey until repaid his loan does not deprive the *cestui que trust* of the benefit of the trust.^(l') But where the land was taken in extinguishment of a debt and it was not shown to be worth more than the debt, and no fraud was shown, an agreement to reconvey was treated, not as a mortgage but as an express trust.^(m)

§ 885. And in order that the transaction shall be deemed a mortgage it is required that the interest of the party setting up the trust shall not have been divested by a judicial sale.⁽ⁿ⁾ So if the obligee of a bond, for the conveyance of land, assigns the bond with a verbal agreement that it shall be held as collateral security for sums due on account, and the account not having been paid, the assignee pays the obligor and takes a deed to himself, there is no implied resulting trust in favor of the assignor.^(o) And where a person at a sale of land became the purchaser, under a promise to hold for the benefit of the children of the former owner upon being repaid the sums advanced by him, this is sufficient to raise a trust in favor of the children on the ground of fraud, and it may be proved by parol;^(p) and where a trust would not be decreed for

defendant under an agreement that the land was to be held by him as the property of the plaintiff and as security to himself of the sum paid by him as the price of the land advanced to the plaintiff, then there was a resulting trust. But that if the defendant, instead of lending to the plaintiff, for the purchase of the land, the money which was the price thereof, and receiving an absolute conveyance thereof as security for the money thus lent, purchased and paid for the land by his own money under an understanding that when the plaintiff should pay to him the price paid by him for the land, he would convey the land to the plaintiff, there was no resulting trust.

^(l') Millard v. Hathaway, 27 Cal. 139.

^(m) Harper v. Harper, 5 Bush, 176, distinguishing Martin v. Martin, 16 B. Mon. 8, and quoting Thomas v. Mc-

Cormack, 9 Dana, 109, for an excellent rule as to when in such cases equity will interfere; see Enaley v. Balentine, 4 Humph. 233; Burt v. Wilson, 28 Cal. 632; and to make the transaction a mortgage the evidence must be clear; Walker v. Locke, 5 Cush. 90; see also McClain v. McClain, 57 Ia. 167.

⁽ⁿ⁾ Lathrop v. Hoyt, 7 Barb. 62, holding that a contract to redeem land is clearly within the Statute of Frauds.

^(o) Ramsdell v. Emery, 46 Me. 311. In Hovey v. Holcomb, 11 Ill. 663, where a deed of the land had been under a parol agreement that the vendee should pay out of the profits, debts of the vendors, pay himself a commission, and then reconvey to the vendors in certain proportions, it was held that the Statute of Frauds being set up applied; the trust being an express one.

^(p) Wright v. Gay, 14 Chic. Leg. N.

the grantor, it was sustained for the grantor's wife and children under a parol arrangement.(g)

§ 886. Express trusts in writing may be rebutted by parol on the ground of fraud ;(r) as for instance in a case where, instead of a declaration of trust, the instrument executed had been a mere contract to reconvey land, or where a bill had been filed to establish a trust, the defence that the conveyance had been made to delay creditors would bar the relief.

Fraud generally in rebutting trust.

§ 887. (E.) As to how far an express trust in violation of law may be proved in order to defeat the devise or demise, and raise a resulting or constructive trust, it may be said that if a will shows the devisees to be trustees, and the trust is ineffectually disposed of, and the heirs allege the trust to be within the Statute of Mortmain, the bill must be answered.(s) And if the answer shows the bill to be for a charity, a resulting trust will be decreed.(t) If the trustees, under a will

Express trusts in violation of law.

30, where three brothers furnished money to purchase the land of their sister at a judicial sale for the benefit of her children, and one of the brothers bought the land under this arrangement, taking the deed in his own name to secure himself and his brothers for the money advanced, made the promise to hold in trust for the sister's children; though only verbal (it also appearing that the purchaser had made and delivered a deed to the children which was returned to him to get his wife's signature and release of dower), it was held that a court of equity would compel an execution of the trust by a conveyance to the children of the sister.

(g) *McDaniel v. Self*, 8 Humph. 59, where, in consideration of money paid, Self, the defendant, orally agreed to convey land, called the Gap Creek Tract, to McDaniel, his son-in-law, remainder to the wife and children of the latter, who went into possession and made improvements. The land was afterwards exchanged for other land, which was conveyed finally to Self in trust for McDaniel's creditors. It was held that the

trust as to the Gap Creek tract attached to the new land, and while it appears it would have been enforced in favor of the wife and children of McDaniel, the plaintiff, against the defendant, an action by McDaniel alone did lie under the circumstances. And in *Hampton v. Spencer*, 2 Vern. 288, the plaintiff sued in Chancery for reconveyance of the land or repayment by him of the purchase-money received. The defendant answered that the conveyance was absolute without power to redeem, but that it was agreed that after reimbursement of the purchase-money he should hold in trust for plaintiff's wife and children; the plaintiff objected, that the confession bound the defendant, and the trust was decreed according to the answer's confession in favor of wife and children.

(r) *Servis v. Nelson*, 1 McCarter, 94; *Hutchinson v. Tindall*, 2 Green, Ch. 357; *Cuney v. Dupree*, 21 Tex. 217. See *Owens v. Owens*, 23 N. J., Ch. 62.

(s) *Boson v. Statham*, 1 Eden, 511; see note on p. 515, with cases.

(t) In *Boson v. Statham*, *supra*, it

which recites an undescribed trust, answer that a memorandum of the testator's recited the trust to be for a charity described, but that they hold under the will, and not subject to any secret trust, the express trust is proved and defeated, and a resulting trust to the heirs will be decreed.(u)

§ 888. But it was once said that the statute of mortmain does not abrogate the Statute of Frauds, and parol evidence merely for the purpose of applying the former statute is inadmissible.(v) But to set aside a gift as void under the statute of mortmain the clearest evidence is required ;(w) and where there is no obligation in the devisee to give to the charity or any promise given by him to the testator to that effect, there will be no trust decreed to which the statute of mortmain can be applied.(x) Or

The Statute of Mortmain.

is said that the Statute of Frauds does not prevent parol proof being given of a trust void under the Statute of Mortmain, nor from showing that an absolute devise was really under such a trust. The note to this case reads: "This subject has been lately much discussed, and it appears from the cases that the doctrine is now established as follows: If the will contains a sufficient denotation of the intention that the devisees should be trustees (a circumstance which failed in *Adlington v. Cann*), and the heir, claiming upon the ground that the trust is ineffectually disposed of, alleges by his bill a trust against the policy of the law, such bill must be answered, and if it appears by the admission of the answer that there was a secret trust for a charity, there will be a resulting trust for the heir. *Edwards v. Pike*, ante, 287; *Muckleston v. Brown*, 6 Ves. 68; *Martin v. Hutton and Bishop v. Talbot*, cit. ib.; *Strickland v. Aldridge*, 9 Ves. 517; *Paine v. Hall*, 18 Ves. 475."

(u) In *Bishop v. Talbot* (see 6 Ves. Jr., p. 60), A. gave his estate in trust, not stating for what, and A.'s heir brought a bill stating a secret trust.

The defendants, X. and Y., stated that they had a memorandum in the testator's handwriting reciting the will and declaring the intent of the will to be for a charitable purpose, but added that they did not consider the premises to be devised under any secret trust, or in any other wise than as declared by the will. The court, treating the case as apart from this memorandum, held that there was a resulting trust, and it would seem that the charitable trust would apparently have been void under the Mortmain Act.

(v) In *Adlington v. Cann*, 3 Atk. 149, it was held that charitable uses came within the clause of the Statute of Frauds relating to devises, and that relating to trusts, where *Hardwicke, Ld. Ch.*, cited *Lord Talbot in Attorney-Genl. v. Spillet*, 3 P. Wms. 344.

(w) *Lomax v. Ripley*, 24 L. J. Ch. 257, citing all the cases.

(x) In *Lomax v. Ripley*, *supra*, it was held that a devise and bequest made to one in confidence that it should go to a charity illegally under the Statute of Mortmain, but where no obligation was laid upon the devisee by the testator nor any promise was given by the former to the latter, raised no

where an alleged trustee admits by his answer that an advowson was held by him because the real owner was a papist, incompetent to take, a resulting trust was decreed in favor of the person next qualified to take, notwithstanding the Statute of Frauds.(y)

A resulting trust is the mere creature of equity as a resulting use in law, and it cannot therefore arise where there is an express trust declared by the parties and evidenced by a written declaration of such express trust; and equity will never raise a resulting trust in fraud of the laws of the land.(z)

Express and constructive trusts not co-existent.

§ 889. (F) Express trusts may be proved by parol when there has been part performance;(a) as, for instance, by waiver of a legal right; as the right to redeem property sold for taxes,(b) or a right of appeal or to an exemp-

Effect of part performance.

trust in the devisee so as to bring the case within the Mortmain Act. See numerous cases cited by counsel.

(y) In *Cottington v. Fletcher*, 2 Atk. 155, the defendant set up the Statute of Frauds, but admitted that an advowson which was in suit was assigned to him not for himself, but because the assignor could not hold it, being a papist. It was held that the answer admitting the facts, the plea of the Statute of Frauds went for nothing. The defendant went on to say in his answer that as it seemed he was to present a third person to the advowson, it was held that after the first presentation the remaining right reverted to the plaintiff, inasmuch as the admission of an express trust showed a resulting trust.

(z) *Leggett v. Dubois*, 5 Paige, 117, where an alien disqualified to hold land took title in the name of another. See also *Miller v. Davis*, 50 Mo. 572; *Jones v. Badley*, L. R. 3 Ch. 362.

(a) *Ryan v. Dox*, 34 N. Y. 313; *Robbins v. Robbins*, 89 N. Y. 257; *Karr v. Washburn*, 56 Wis. 303; *Wood v. Mullock*, 48 N. Y. Sup. 70. See chapter "Performance."

(b) *Merritt v. Brown*, 4 C. E. Green, 289, which is an illustration of sustain-

ing a parol contract of redemption where the purchaser at sheriff's sale has got the property at a lower price under an agreement with the owner to let him redeem; the rule is said to rest better on the principle of part performance, inasmuch as the owner has refrained from protecting his interest at the sale. It cannot be a resulting trust as to the value of the property above the bid, as *non constat* but the bid represented the market value. S. C. 6 C. E. Gr. 401, being affirmed on another ground, it is said that this case is simply a purchase under a parol promise to hold for the benefit of the defendant in execution, and that such an arrangement, the Statute of Frauds being set up as a defence, cannot be enforced either at law or in equity. Such arrangements do not fall within the doctrine which enables a court of equity to effectuate, in derogation of the Statute, parol contracts touching lands on the plea of part performance. At page 404, the court continues to say that in *Combs v. Little*, 3 Green's Ch. 310, the Statute of Frauds was not pleaded, and in that case, as also in *Marlatt v. Warwick*, 4 C. E. Green, 443, there were present circumstances of fraud upon which the judgment of the

tion,(c) or by possession taken and money or labor expended.(d) But if the possession taken is afterwards abandoned, the part performance is insufficient.(e) Moreover, the possession taken must be in accordance with and referable to the contract of purchase.(f)

And to take a case out of the Statute of Frauds upon the ground of part performance, a completed agreement is always supposed, and whatever has been done by way of part performance must have been done in view of that agreement;(g) but payment of the pur-

court rested. In the latter case, the point now considered was not noted in argument, and was passed without adjudication by the court. In the principal case there was no part performance, as, by the purchase at sheriff's sale, the vendee did not take under contract with the late owner.

(c) *Cloninger v. Summit*, 2 Jones, Eq. 513.

(d) *Cope v. Williams*, 4 Ala. 364; *Robertson v. Robertson*, 9 Watts, 34; *Gay v. Hunt*, 11 Murphy, 142; *Pindall v. Trevor*, 30 Ark. 261; *Phyfe v. Wardell*, 2 Edw. Ch. 51; *Church v. Sterling*, 16 Conn. 400. In *Phyfe v. Wardell*, *supra*, it is said "the bill sets forth the reasons of an omission, which was induced by the representations of the defendants and the complainant confided in them. If they were now permitted to take advantage of the omission, and hold the complainant strictly to the written memorandum as the only evidence of the agreement, this court would be sanctioning the commission of a fraud. For the purpose of preventing such a consequence, this court, under the circumstances, is at liberty to disregard the writing and treat the whole transaction as a verbal contract. And upon the basis of part performance, where possession has been taken or the acts done amount to part performance, it may receive parol proof of the whole agreement, independent of or in connection with what may be in writing, in

order to make out the contract. This principle appears to have been acknowledged by Ch. J. Thompson before the Court of Errors in *Parkhurst v. VanCortland*, 1 Johns. Ch. 280, and this I think is fairly deducible from what was said by Lord Redesdale in *Walt v. Grove*, 2 Sch. & Lef. 502, namely, that under circumstances (like the present) which denote fraud in omitting to reduce a part of the agreement into writing, the whole is open to parol proof." In *Faris v. Dunn*, 7 Bush, 276, it was held that possession by the *cestui que trust* under a verbal contract creating a resulting trust is a sufficient defence whether enforceable or not against parties in adverse possession.

(e) As to the length of continuance in possession, see *Williamson v. Williamson*, 4 Iowa, 282.

(f) *Williamson v. Williamson*, *supra*; *Robertson v. Robertson*, 9 Watts, 34; *Wentworth v. Wentworth*, 2 Minn. 283; *Goodhue v. Barnwell*, Rice's Eq. Rep. 236, citing the cases.

(g) *Church v. Sterling*, 16 Conn. 400; *Thos. Ryan in re*, 3 Eq. Ir. Rep. 238, citing *Lady Thynne v. Earl of Glengall*, 2 H. L. C. 94, *Bowser v. Cravener*, 56 Pa. St. 140, affirms *Cravener v. Bowser*, 4 Pa. St. 259, and says that the cases go no further than holding that there may be a parol rescission of a contract for a sale of land followed up by such part performance that in equity the parties will be bound by the parol rescission. In the principal case no such acts appeared.

chase-money alone is not sufficient,^(h) nor is the part performance sufficient where the original owner only continues over in a possession which had existed long prior to the purchase by the legal holder, and possession under a trust makes the latter good as a defence even when not enforceable.⁽ⁱ⁾ The fraud which will take a case out of the Statute of Frauds upon the ground of part performance must be such that compensation at law would be inadequate to restore the parties to their original situation;^(j) and where there has been part performance, the parol contract might be admitted by way of defence, without allowing the plaintiff to set up the contract, but the rule that he may so do is, perhaps, well established.^(k)

§ 890. (G.) Full performance or execution of the trust will also take the case out of the Statute of Frauds;^(l) especially after lapse of

(A) *Blodgett v. Hildreth*, 103 Mass. 486; *Church v. Sterling*, 16 Conn. 400; *Jackson v. Cutright*, 5 Munf. 311; *Spencer's App.*, 80 Pa. St. 330; *Wheeler v. Reynolds*, 66 N. Y. 231. In *Moote v. Scriven*, 33 Mich. 504, it is said that Moote had no interest in the land whatever. The dealings amounted only to a verbal agreement with Scriven to advance money to purchase lands and to remove incumbrances on them, which he was ultimately to transfer to Moote on repayment. There was nothing which could have been enforced by specific performance, as Moote was all the time in possession, and there was no act of his to his own prejudice which would amount to a part performance. For cases in which the acts alleged were insufficient as part performance, see *Workman v. Guthrie*, 29 Pa. St. 506; *Loomis v. Loomis*, 60 Barb. 22.

(i) *Lynch v. Cox*, 23 Pa. St. 265. See *Spencer's App.*, 80 Pa. St. 330, as to change of possession in the case of tenants in common.

(j) *Chastain v. Smith*, 30 Ga. 97.

(k) *Wallace v. Brown*, 2 Stockt. 308, where the doctrine was questioned on principle.

(l) *Eaton v. Eaton*, 35 N. J. (Law) 292; *Ready v. Keesley*, 14 Mich. 224. See also *Clark v. Trindle*, 52 Pa. St. 495; *Borst v. Nalle*, 28 Gratt. 424, where T., an executor, employs R. to sell a tract of land for him; and, to facilitate it, T. executes a deed to R. but does not deliver it. R. makes a sale to B. and pays the money to T., and then T. delivers the deed to R., and at the same time R. executes a deed to B. In a suit by a judgment creditor of B. against B. to subject the land to pay his debt, it was held that T. was a competent witness to prove the fact that R. sold as his agent; that the conveyance to him was that he might convey to B., and that B. paid the purchase-money to him; and also that by the conveyance to R. there was an implied or resulting trust in favor of B., who had paid the purchase-money; and this trust may be proved by parol evidence; inasmuch as the trust having been fully executed by R., conveying the land to B. before this litigation was commenced, it seems that, on that ground, parol evidence is admissible to establish the trust. See also *St. John v. Benedict*, 6 Johns. Ch. 111; *Eaton v. Eaton*, 35 N.

Effect of full
perform-
ance.

time;(m) and where land bought had been resold, an express trust in the proceeds was provable by parol.

Or where the purchaser who promises to buy for the equitable claimant, an execution defendant, resells the land and takes a note for the price, and deposits the note in trust with a third person, the latter is liable to the equitable claimant; or if the alleged trustee under an agreement to take title by means of the equitable claimant's title-bond and share the land and so took title and conveyed under the contract, he cannot be disturbed in his half of the land; and when the vendee has bought at a low price, under agreement to apply the proceeds in a certain way, the Statute of Frauds is no bar to a recovery after a conveyance to the vendee and a resale by him.

This subject is fully treated in the chapter upon Performance, but it may be noticed in this place that parol evidence is admissible to show how far a discretionary trust has been performed;(n) and where a contract contains several stipulations, some of which are within the Statute of Frauds and others are not, and mutually dependent, a performance of those within the statute will operate to so separate such stipulations that an action will lie to enforce the unperformed parts of the contract not within the statute.(o) Moreover, creditors cannot set an executed trust aside; and a trust is good where two persons transfer money before their marriage to trustees upon the trusts agreed upon by them by parol merely, and the trustees accept the money accordingly, whether there be or not any subsequent declaration of trust in writing.(p)

J. (Law) 292, where it was held that a voluntary payment with full knowledge of the facts cannot be recovered back, applies in the case of the performance of liabilities which under the Statute of Frauds could not be enforced, citing *Abell v. Douglass*, *Smith v. Smith*, *Coughlin v. Knowles*, and other cases; and that the fact that when the voluntary payment was made the defendant gave the person paying a due-bill for the amount does not prevent, under the Statute of Frauds, the admission of evidence to show that the original payment for which the due-bill was given was a

voluntary performance of a trust not enforceable under the Statute of Frauds.

(m) *Elliott v. Morris*, Harper, Eq. 282.

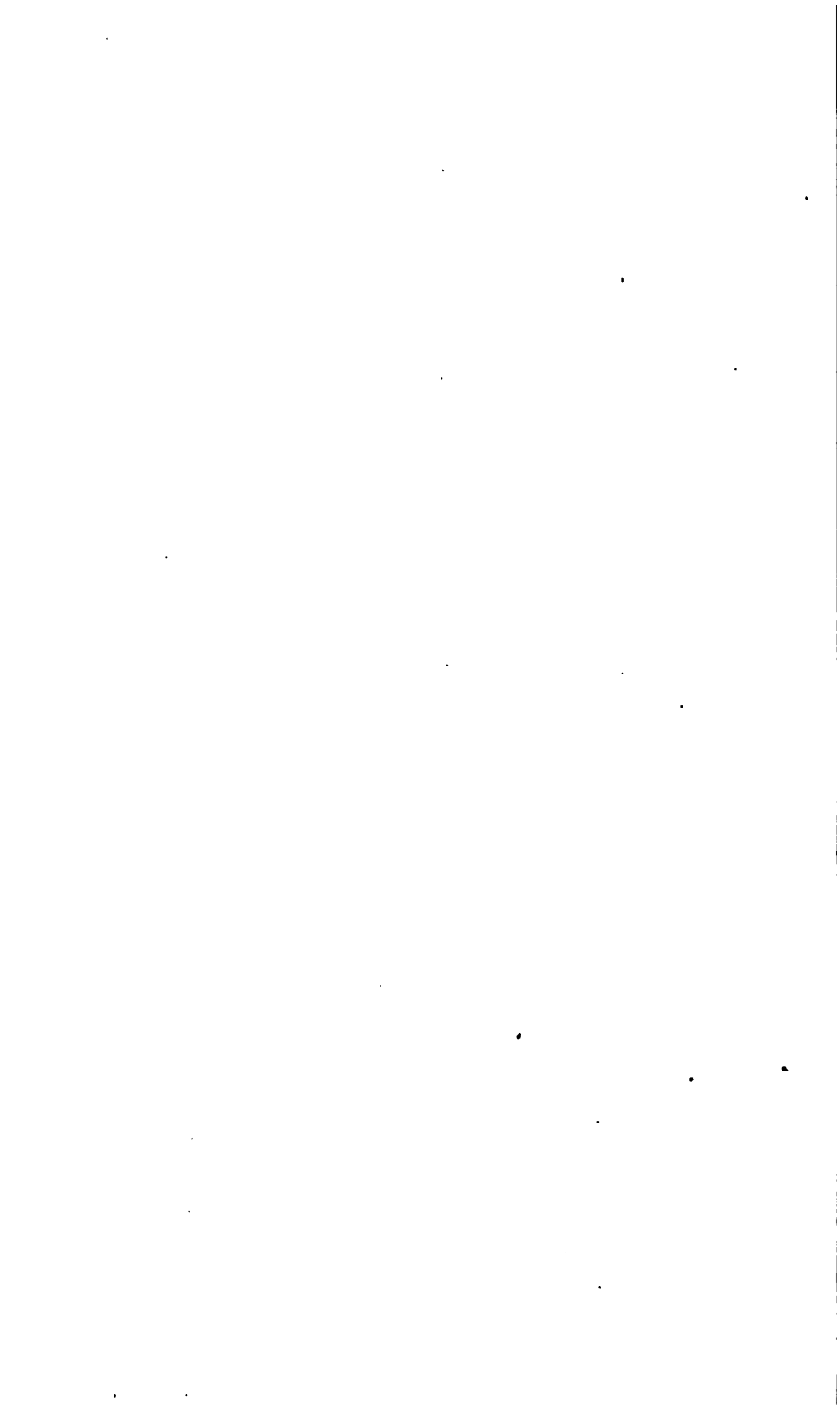
(n) *Simmons v. Smith*, 11 Ga. 195.

(o) *Sinkler v. Swaynie*, 71 Ind. 562. In *Whiting v. Gould*, 2 Wis. 597, *Smith, J.*, in a concurring opinion, said that under the Statute of Frauds a vested trust might be assigned, but not an executory one resting in contract. And see *Wilburn v. Spofford*, 4 Sneed, 699, for a trust sustained as having been fully executed.

(p) *Cooper v. Wormald*, 27 Beav. 266; *Lowry v. McGee*, 3 Head. 274, where a

And in a case where a mother made a parol agreement with her son to unite in certain conveyances, and the son was to convey a lot to his son, the parol agreement raised a trust in the father as to his son, and was not void when executed as to the father's creditors.(q)

brother who, having received a large estate under his father's will, promised his father to buy an estate for his the promisor's sister, and did so, but took title in his own name, and executed no written declaration of trust, he was held not to be bound, because there was no consideration, and it was an unexecuted trust, binding only *in foro conscientie*.
(q) Norton v. Mallory, 1 Hun, 499.









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